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No. 04-531

In The
Supreme Court of the United States

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

LORD SHAWN RUSSELL,

Respondent.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DOES A TRIAL COURT ERR IN REQUIRING THAT A DEFENDANT REPRESENT HIMSELF WHEN THE DEFENDANT PERSISTS IN DEMANDING NEW COUNSEL WITHOUT MAKING A SHOWING THAT HIS CURRENT COUNSEL IS INEFFECTIVE, AND AFFIRMATIVELY REFUSES THE SERVICES OF HIS CURRENT APPOINTED COUNSEL?

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OPINIONS BELOW

The Supreme Court opinion reversed the February 14, 2003 opinion of the Michigan Court of Appeals. The opinion of the Michigan Supreme Court (App. 1) is published at 471 Mich. 182, 684 N.W.2d 745 (2004). The opinion of the Michigan Court of Appeals (App. 39) is published at 254 Mich. App. 11, 656 N.W.2d 817 (2003). No written opinion was issued by the trial court.

STATEMENT OF BASIS FOR JURISDICTION

Petitioner files this petition for writ of certiorari seeking review of a July 27, 2004 ruling of the Michigan Supreme Court holding that respondent did not waive his right to representation by counsel, and that the trial court violated respondent's Sixth Amendment right to representation by counsel by ordering that respondent represent himself. Review by certiorari is sought under 28 USC § 1257. This petition, filed before October 25, 2004, is timely and vests this Court with jurisdiction to consider the petition.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment of the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

> of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

The People of the State of Michigan pray that a writ of certiorari issue to review the July 27, 2004 judgment of the Michigan Supreme Court. The Supreme Court opinion reversed the February 14, 2003 opinion of the Michigan Court of Appeals. The opinion of the Michigan Supreme Court (App. 1) is published at 471 Mich. 182, 684 N.W.2d 745 (2004). The opinion of the Michigan Court of Appeals (App. 39) is published at 254 Mich. App. 11, 656 N.W.2d 817 (2003). No written opinion was issued by the trial court.

Respondent Lord Shawn Russell was convicted in a jury trial, held on July 10-13, 2000, before Kent County Circuit Judge Donald A. Johnston, of the offenses of possession with intent to deliver less than fifty grams of a mixture containing the controlled substance cocaine, MCL 333.7401(2)(a)(iv), and possession with intent to deliver less than fifty grams of a mixture containing the controlled substance heroin, MCL 333.7401(2)(a)(iv). On September 11, 2000, he was sentenced as a habitual offender, MCL 769.12, to 2-1/2 to 40 years' imprisonment on both charges.

On the day of trial, before jury selection had taken place, respondent made clear to the court that he did not want to be represented by his appointed counsel, Damian Nunzio (App. 53). He described the ways in which he believed Mr. Nunzio's representation to be inadequate (App. 53-54). The judge noted that respondent had been represented by

another appointed attorney, Paul Mitchell, before the court replaced him with Mr. Nunzio (App. 54). The judge then explained to respondent that he had four options: (1) be represented by Mr. Nunzio; (2) retain counsel at respondent's expense; (3) represent himself without assistance; or (4) represent himself with Mr. Nunzio available as a consultant (App. 55-56). Respondent reiterated that he did not want to be represented by Mr. Nunzio (App. 58). The court again explained to respondent what his options were, after warning him about the dangers of self-representation (App. 59). Respondent insisted that he had a right to have new counsel appointed (App. 59). The court pointed out that respondent had a right to appointed counsel, but not necessarily appointed counsel that respondent would "find to be personally pleasing to yourself" (App. 60). Respondent then complained that the court had allowed his earlier attorney, Paul Mitchell, to withdraw; the court indicated that Mitchell had withdrawn because of a breakdown in the relationship with respondent (App. 60).

Mr. Nunzio then addressed the court, saying that he had been unaware of any breakdown in the attorney-client relationship and that he was prepared to go to trial (App. 63). After the court told respondent that it saw no problem from Mr. Nunzio's standpoint, respondent again said that he had problems with Mr. Nunzio, and referred to a "grievance opinion" (App. 64). Mr. Nunzio told the court he was unaware of any grievance that respondent may have filed with the State Bar of Michigan, saying that he had received no notice of a grievance being filed (App. 64). The court informed respondent that it also was unaware of any grievance being filed (App. 64). It then told respondent again that respondent had to make a choice as to how he wanted to proceed, and offered him the opportunity to consult with

Mr. Nunzio before he made a choice (App. 64-65). Respondent said, "Your Honor, I thought I made myself clear here," after which the court pointed out that respondent had not chosen one of the options given him (App. 65). The court again went through what respondent's options were (App. 65). The court suggested to respondent that he was not versed in legal procedure; respondent agreed with the court's assessment (App. 65).

Respondent then described what he considered to be Mr. Nunzio's deficits in representing him. First, he said that no "evidentual" hearing (apparently a preliminary examination) had been held; the court corrected respondent, saying that one had, in fact, been held (App. 66-67). Respondent then claimed that no motion under the "14 day rule"[1] had been filed; the court noted that the motion would had to have been filed by Mitchell when he still represented respondent (App. 67). Respondent further complained that he had not been given an opportunity to view the evidence received by Mr. Nunzio; the court offered him an opportunity to view the evidence (App. 67-68). Respondent then said that he needed his witnesses for trial (App. 69). Mr. Nunzio informed the court that "[T]his is now news to me. . . . [I]f [respondent] has relevant triable witnesses, I'd certainly be more than happy to meet with him and discuss who those witnesses might be" (App. 70). After the court offered respondent the opportunity to consult with Mr. Nunzio, respondent said that he did not "want any contact with Mr. Nunzio," and claimed that Mr. Nunzio had "told me that he will convict me" (App. 71). Respondent went on to say that

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[1] Preliminary examinations in Michigan are required to be scheduled to take place not more than 14 days after the arraignment. MCL 766.4.

"[t]here's no way that I will let him try to defend me" (App. 71). The court then indicated to respondent that, since he did not appear to want to provide Mr. Nunzio with the names of his witnesses, "I don't know how we can possibly get them in here" (App. 72). The court offered to issue subpoenas for the witnesses if respondent would give the information to the court (App. 72). It also indicated to respondent that it was time to proceed with the case (App. 72).

Respondent then said the following:

> All right. Well, I just want it noted that I have stated the conflict between me and attorney Nunzio, and the statements that Mr. Nunzio has made in regards to me and my case, and there's no way that I would feel comfortable with him having anything to do with the defense on my behalf.
>
> And I'm requesting that you remove him from my case [App. 72].

He went on to request again that new counsel be appointed for him (App. 72). The court responded that Mr. Nunzio was respondent's appointed counsel, and that respondent had not given a reasonable basis for removing Mr. Nunzio from the case (App. 73). The court then recommended that respondent allow Mr. Nunzio to represent him, adding, "Failing that, I will protect your right to defend yourself" (App. 73). The court then adjourned briefly so respondent and Mr. Nunzio could go over the documentary evidence in the case (App. 73-74).

When the court reconvened, Mr. Nunzio told the court what documents he had provided to respondent (App. 75). He then added, "And just to further note that I believe [respondent] still contends he wishes to represent himself"

(App. 75). When the court asked respondent directly if he wanted to represent himself at trial, respondent answered, "Your honor, first of all, I only spoke with Mr. Nunzio for about five minutes" (App. 75). The court offered to give respondent more time to speak with Mr. Nunzio; respondent declined the offer (App. 76). He then told the court that he had not received a complete copy of the documents (App. 76). After some discussion, the court concluded that, in fact, respondent had received all the documents (App. 79). Again, the court told respondent that it did not see any conflict between Mr. Nunzio and respondent, and that any problem "is of your creation" (App. 80-81). Respondent continued to argue with the court as to whether Mr. Nunzio was representing his best interests (App. 81). The court finally told respondent the following:

> [Mr. Nunzio]'s a good lawyer and he's doing his job. My suggestion to you is that you cooperate with the man so he can do his job. And if you can't cooperate with the man, then you can try the case yourself, and that's fine. You have a constitutional right to do it. I don't think it's a good idea, but I'm here to guarantee your constitutional rights. And if you want to try your case yourself, by goodness, that's what we're going to do. [App. 82]

Respondent said he wanted competent counsel; the court responded that respondent had competent counsel sitting next to him (App. 82-83). Finally, the court concluded that a jury panel would be called (App. 84).

As previously noted, respondent was convicted following a four-day trial of the charged offenses. His conviction was affirmed on November 8, 2002 by the Michigan Court of Appeals, which concluded that respondent had waived

his right to counsel by his conduct (App. 44). On July 27, 2004, the Michigan Supreme Court reversed the judgment of the Court of Appeals and remanded the case for a new trial (App. 1). In making its ruling, the court concluded that respondent had "clearly and unequivocally declined self-representation" (App. 1).

REASONS FOR ALLOWING THE WRIT

Petitioner submits that the issue in this case presents a conflict in the rulings of the federal courts and the Michigan Supreme Court. Specifically, the Michigan Supreme Court held in the present case that, because defendant said he did not want to go to trial without counsel, he did not waive his right to counsel, even though he rejected all the options for counsel that were available to him. In doing so, it refused to follow opinions of the federal circuit courts, which have held that a criminal defendant, by insisting on new counsel (or, as in some of the federal cases, "lay counsel") and refusing all other assistance available to him, waives his right to counsel. Petitioner believes that the federal cases, which recognize such a waiver of counsel, correctly state the rule, while the Michigan Supreme Court incorrectly refuses to recognize such a right. We ask this Court to grant certiorari to resolve this conflict.

The right to self-representation is guaranteed by the Sixth Amendment. *Faretta v. California*, 422 U.S. 806, 819-820, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). A defendant may waive his right to counsel, provided that he do so "competently and intelligently." *Johnson v. Zerbst*, 304 U.S. 458, 468, 58 S. Ct. 1019, 82 L. Ed. 2d 1461 (1938). Of course, all

presumptions are indulged against waiver of the fundamental right to counsel. *Id.* at 464. The question of whether a defendant has intelligently waived counsel depends on the facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. *Id.* at 468. This Court has never expressly addressed the issue of whether a defendant may waive the right to counsel by his or her conduct.

Waiver of rights from conduct is hardly a new concept. The federal circuit courts have recognized the principle that a waiver of counsel may be inferred from conduct. *United States v. Hoskins*, 243 F.3d 407, 410 (CA 7, 2001) ("It is not necessary, however, 'that the defendant verbally waive his right to counsel; so long as the district court has given a defendant sufficient opportunity to retain the assistance of appointed counsel, defendant's actions which have the effect of depriving himself of appointed counsel will establish a knowing and intentional choice.'"); *United States v. Kneeland*, 148 F.3d 6, 11 (CA 1, 1998). The Sixth Circuit has held that a defendant may, by understandingly rejecting the option of having counsel appointed for him, be considered to have waived the right to counsel. *United States v. Krzyske*, 836 F.2d 1013, 1017 (CA 6, 1988).

In *Krzyske*, *supra*, the defendant moved to be represented by "lay counsel," claiming that the Constitution guarantees the right to be represented by counsel, whether or not the counsel is an attorney. 836 F.2d 1015. The magistrate informed him that he could not proceed with lay representation, but informed him that he had the right to court-appointed counsel if he could show that he was indigent. *Id.* at 1016. Mr. Krzyske rejected this option, refusing to fill out an affidavit of indigency. *Id.* On the day of trial, Mr. Krzyske said he would accept the assistance of

a court-appointed attorney if he could not be assisted by a nonlawyer, and that he needed the help of an attorney to fill out the affidavit of indigency. *Id.* The trial court ruled that, under the circumstances, Mr. Krzyske should proceed pro se. *Id.*

In overruling Mr. Krzyske's claim that he was improperly denied his right to counsel, the Sixth Circuit noted that "a litigant cannot play a 'cat and mouse game' with the court in order to preserve an issue or appeal or to delay proceedings." *Krzyske, supra*, 836 F.2d 1017. It also noted that respondent was aware that he had a reasonable opportunity to retain counsel. *Id.*

The Michigan Supreme Court in the present case acknowledged the federal caselaw, but said that these cases were in contravention of *Johnson v. Zerbst*. *People v. Russell*, 471 Mich. 182, 193 fn. 26, 684 N.W.2d 745 (2004) (App. 12). The court recognized that respondent's insistence on new appointed counsel, and his emphatic rejection of his appointed counsel, was unreasonable, but refused to find that this constituted a waiver of the right to counsel. This conclusion conflicts with (and in fact rejects) the federal cases on this issue.

When respondent told the court that he was rejecting Mr. Nunzio's services, and gave no indication that he would be able to retain counsel, he effectively refused all options available to him for representation by counsel. It is immaterial that he insisted that he did not want to represent himself; he rejected the representation of his appointed counsel, failed to make a showing that counsel had been ineffective, and gave no indication that he could retain counsel. Even assuming that respondent's first choice would have been to have new counsel appointed, an indigent defendant does not have a right to appointed

counsel of his choice in Michigan. *People v. Portillo*, 241 Mich. App. 540, 543, 616 N.W.2d 707 (2000). Similarly, this Court has recognized that a criminal defendant has no right to appointed counsel of his own choice. *United States v. Wheat*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). Respondent failed to make a showing of ineffectiveness of counsel. In addition, he emphatically rejected the option of being represented by Mr. Nunzio, telling the court at one point that "[t]here's no way that I will let him try to defend me" (App. 71). Since respondent had rejected all other options, the court's only reasonable option was to order that respondent represent himself.

However, the Michigan Supreme Court, relying on *Johnson v. Zerbst, supra*, and *People v. Adkins (After Remand)*, 452 Mich. 702, 723, 551 N.W.2d 108 (1996), concluded that, because all reasonable presumptions are indulged against the waiver of counsel, and because respondent insisted that what he wanted was new counsel, he was denied his Sixth Amendment right to counsel when the court ordered him to represent himself (App. 12-13). However, as this Court has noted, a court has no right to "compel a defendant to accept a lawyer he does not want." See *Faretta, supra*, 422 U.S. 832. When, as in the present case, a criminal defendant emphatically rejects the assistance of his appointed counsel, fails to show that appointed counsel has been ineffective, and gives no indication that he or she can retain counsel, ordering the defendant to proceed with the currently appointed counsel could violate the rule articulated in *Faretta*.

This does not mean, however, that the trial court is faced with an impossible decision. As the federal caselaw correctly notes, a defendant, by insisting on a form of

representation to which he is not entitled (here, appointment of new counsel), and expressly rejecting all options for representation to which he *is* entitled, may waive his right to counsel by his conduct, even if he indicates that he does not want to represent himself. This case falls squarely under the rule recognizing waiver by conduct. By refusing to recognize respondent's waiver of the right to counsel, the Michigan Supreme Court was in error.

The conflict between the federal courts and the Michigan Supreme Court was also noted by Justice Markman in his dissenting opinion in the present case, in which he urged that certiorari be granted to "clarify the operation of the presumption against the waiver of trial counsel" (App. 14). Petitioner agrees with Justice Markman that certiorari should be granted to resolve this conflict between the Michigan Supreme Court and federal courts.

RELIEF REQUESTED

WHEREFORE, for the reasons stated herein, Petitioner respectfully prays that the application for writ of certiorari be granted, and upon further review that the judgment entered by the Michigan Supreme Court be REVERSED and that the conviction and sentence entered in this cause by the Circuit Court for the County of Kent be AFFIRMED.

Respectfully submitted,

WILLIAM A. FORSYTH (P23770)
Kent County Prosecuting Attorney

Dated: October 19, 2004

TIMOTHY K. MCMORROW (P25386)
Chief Appellate Attorney

GARY A. MOORE (P34590)
Assistant Prosecuting Attorney

No. _____

In The
Supreme Court of the United States

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

LORD SHAWN RUSSELL,

Respondent.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Michigan Supreme Court
Lansing, Michigan

Opinion	Chief Justice:	Justices:
	Maura D. Corrigan	Michael F. Cavanagh Elizabeth A. Weaver Marilyn Kelly Clifford W. Taylor Robert P. Young, Jr. Stephen J. Markman

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FILED JULY 27, 2004

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

v

No. 122998

LORD SHAWN RUSSELL,

Defendant-Appellant.

BEFORE THE ENTIRE BENCH

YOUNG, J.

In this case, we granted leave to appeal to consider whether a defendant may, by conduct alone, "unequivocally" waive his Sixth Amendment Right to counsel and elect to proceed pro se. We need not reach that question in this case because a review of the record reveals that defendant clearly and unequivocally declined self-representation. We reverse the decision of the Court of Appeals and remand for a new trial.

I. Facts and Procedural History

Defendant was charged with possession with intent to deliver less than fifty grams of both cocaine and heroin.[1] At the beginning of trial, defendant informed the trial court that he wanted his trial counsel, Damian Nunzio, removed and new trial counsel appointed.[2]

The trial court did not grant defendant's request, but noted that he "would entertain" the request if defendant presented "some valid reason" to appoint substitute counsel other than "personality difficulties." Defendant offered no such explanation. After refusing to grant defendant's request, the trial court offered defendant the following four options:

> [O]ur alternatives here are basically these. You may, if you have made arrangements on your own, bring in your own lawyer at your own expense and hire anybody you want, and I will allow that lawyer to substitute right now and we'll go from here.
>
> Option number two, we can go forward with Mr. Nunzio, the second lawyer that's been provided for you at government expense, and try this case on the merits. I would strongly suggest that, if Mr. Nunzio thinks you have a valid defense, that you consult with him and work with him on it because he's a man that knows how to present such a defense.

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[1] MCL 333.7401(2)(a)(iv).

[2] Mr. Nunzio was defendant's second appointed attorney. Defendant's first appointed attorney withdrew after defendant complained about counsel's representation.

> Or number three, you may decide to serve as your own counsel and represent yourself. I caution you strongly against the third course because obviously a trial involves issues of complicated legal procedure and, unless you are legally trained, and I don't know whether you are or not but I suspect you are not, there are many pitfalls there for the unwary.
>
> And that leads us, I suppose, to option four, which is sort of a variation on option number three, in which you provide your own defense but Mr. Nunzio would be available to consult with you and provide you assistance as to technical legal points when you need counsel.[3]

After defendant continued to indicate that he did not "feel comfortable" with his appointed attorney's representation, the trial court reminded defendant of his other available options – defendant could retain counsel or he could represent himself:

> The Court: And, while I would not advise it, I will certainly guard your rights and see to it that you have the opportunity to present your own defense, if that's your wish.
>
> Defendant: Well, that's putting words in my mouth. I –
>
> The Court: Well, then maybe you should put words in your mouth and tell me what you want.
>
> Defendant: I told you. I don't want Mr. Nunzio as my attorney.

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[3] Thus, two of the four options presented to defendant involved forms of self-representation.

> The Court: . . . So, your options are really kind of limited.
>
> Defendant: The State has the obligation to give me representation.

At a later point in the proceedings, the following exchange occurred:

> The Court: . . . And if you can't cooperate with the man, then you can try the case yourself, and that's fine. You have a constitutional right to do it. I don't think it's a good idea, but I'm here to guarantee your constitutional rights. And if you want to try your case yourself, by goodness, that's what we're going to do.
>
> Defendant: Well, that's what you keep insisting that I do, *and I'm telling you that I need competent counsel*. . . . [Emphasis added.]

Although the trial court then gave defendant several more opportunities to select among the four proffered options, defendant continued to reject all of them. The trial court then empaneled the jury and asked defendant if he had any questions for the panel. Defendant stated:

> Yes. Ladies and gentlemen, this is something totally new for me. I'm being forced into this situation. . . .
>
> I requested the Court appoint new counsel for me, and they said, for some reason being that we're here and they don't see the difference – any differences between me and Mr. Nunzio. So they forced me to go on with this trial alone by myself.

After a four-day trial, defendant was convicted of both charges and sentenced to consecutive prison terms of 2 1/2 to 40 years for each conviction.

The Court of Appeals affirmed defendant's convictions in a published opinion. The panel concluded that defendant implicitly "made his unequivocal choice" to proceed in propria persona "by his own conduct" when he continued to reject appointed counsel's representation.[4]

II. STANDARD OF REVIEW

We review for clear error the trial court's factual findings surrounding a defendant's waiver. However, to the extent that a ruling involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo.[5]

III. ANALYSIS

A. THE FEDERAL REQUIREMENTS FOR SELF-REPRESENTATION

The Sixth Amendment provides that the accused in a criminal prosecution "shall enjoy the right . . . to have the Assistance of counsel for his defence." US Const, Am VI.[6] This requirement was made applicable to the states

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[4] 254 Mich App 11, 17; 656 NW2d 817 (2002).

[5] See *People v Attebury,* 463 Mich 662, 668; 624 NW2d 912 (2001); *People v Daoud,* 462 Mich 621, 629-630; 614 NW2d 152 (2000).

[6] Likewise, Const 1963, art 1, § 20 provides that the accused in a criminal prosecution "shall have the right . . . to have the assistance of counsel for his . . . defense." Our Michigan Constitution is not at issue here because the federal Supremacy Clause, US Const, art VI, cl. 2, requires that we apply the federal constitutional analogue to the degree that our Constitution provides less protection to a criminal defendant. *California v Ramos,* 463 US 992; 103 S Ct 3446; 77 L Ed 2d 1171 (1983). This case does not present an opportunity to discern whether our Constitution provides a right of self-representation that is greater than its federal counterpart.

through the Due Process Clause of the Fourteenth Amendment.[7] The right to counsel is considered fundamental because it is essential to a fair trial and attaches at the trial stage, which is clearly a critical stage of the proceedings.[8] While a defendant may choose to forgo the assistance of counsel at trial, any waiver of the right to counsel must be knowing, voluntary, and intelligent.[9] In addition, it is a long-held principle that courts are to make every reasonable presumption *against* the waiver of a fundamental constitutional right,[10] including the waiver of the right to the assistance of counsel.[11]

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[7] *Gideon v Wainwright,* 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

[8] *Id.*

[9] *Iowa v Tovar,* 541 US ___; 124 S Ct 1379; 158 L Ed 2d 209 (2004); *Godinez v Moran,* 509 US 389; 113 S Ct 2680; 125 L Ed 2d 321 (1993); *Patterson v Illinois,* 487 US 285, 292 n 4; 108 S Ct 2389; 101 L Ed 2d 261 (1988).

[10] The principle that every reasonable presumption should be indulged against the waiver of a fundamental constitutional right has a long-standing pedigree in federal constitutional law. See *Hodges v Easton,* 106 US (16 Otto) 408, 413; 1 S Ct 307; 27 L Ed 169 (1882) ("It has been often said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver.").

[11] *Johnson v Zerbst,* 304 US 458; 58 S Ct 1019; 82 L Ed 1461 (1938) (every reasonable presumption should be indulged against the waiver of counsel); *Michigan v Jackson,* 475 US 625, 633; 106 S Ct 1404; 89 L Ed 2d 631 (1986); *Martinez v Court of Appeal of California,* 528 US 152, 161; 120 S Ct 684; 145 L Ed 2d 597 (2000) (noting that there is a "'strong presumption against'" waiver of counsel) (citation omitted); *People v Adkins (After Remand),* 452 Mich 702; 551 NW2d 108 (1996).

In *Faretta v California,*[12] the United States Supreme Court held that a defendant "has a constitutional right to proceed without counsel when he voluntarily and intelligently *elects* to do so."[13] While the *Faretta* majority noted that the framers of the Constitution never imagined that the right of self-representation "might be considered inferior to the right of assistance of counsel,"[14] the United States Supreme Court has also noted that the "right to self-representation is not absolute."[15] Indeed, because a defendant automatically enjoys the right to the assistance of counsel,[16] and the right of self-representation and the right to counsel are mutually exclusive, a defendant must *elect* to conduct his own defense "'voluntarily and intelligently,'"[17] and must be made aware of the dangers and disadvantages of self-representation "in order to"[18] proceed

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[12] 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975). In *Faretta,* the majority identified a "nearly universal conviction" that forcing representation on unwilling defendant "is contrary to his basic right to defend himself *if he truly wants to do so." Id.* at 817 (emphasis added).

[13] *Id.* at 807 (emphasis added). See also *Martinez, supra* at 154. In Michigan, the right of self-representation is a right explicitly conferred in our Constitution. See Const 1963, art 1, § 13. This right has been afforded to the citizens of Michigan since 1850. See Const 1850, art 6, § 24.

[14] *Faretta, supra* at 832.

[15] *Martinez, supra* at 161 (emphasis added).

[16] The right to the assistance of counsel is automatic; assuming the right is not waived, assistance must be made available at critical stages of a criminal prosecution, regardless whether the defendant has requested it. *United States v Wade,* 388 US 218, 223-227; 87 S Ct 1926; 18 L Ed 2d 1149 (1967); *Carnley v Cochran,* 369 US 506, 513; 82 S Ct 884; 8 L Ed 2d 70 (1962).

[17] *Martinez, supra* at 161 (citation omitted).

[18] *Faretta, supra* at 835 (emphasis added).

pro se.[19] Therefore, while the right of self-representation is a fundamental constitutional right, other interests, such as the failure to effectively waive the right to counsel or a governmental interest in "ensuring the integrity and efficiency of the trial" may in some instances outweigh the defendant's constitutional right to act as his own counsel.[20] In sum, although the right to counsel and the right of self-representation are both fundamental constitutional rights, representation by counsel, as guarantor of a fair trial, "is the standard, not the exception,"[21] in the absence of a proper waiver.

B. MICHIGAN'S APPLICATION OF THE FEDERAL STANDARD

In *People v Anderson*,[22] this Court applied the *Faretta* standard for self-representation and established requirements regarding the judicial inquest necessary to effectuate a valid waiver and permit a defendant to represent himself. Upon a defendant's initial request to proceed pro se, a court must determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting his right

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[19] Moreover, even once properly elected, self-representation may be terminated or standby counsel appointed, over a defendant's objection. *Faretta, supra* at 834 n 46. Standby counsel may participate in the trial proceedings, without the express consent of the defendant, as long as that participation does not "seriously undermin[e]" the "appearance before the jury" that the defendant is representing himself. *McKaskle v Wiggins*, 465 US 168, 187; 104 S Ct 944; 79 L Ed 2d 122 (1984).

[20] *Martinez, supra* at 162.

[21] *Id.* at 161. See also *United States v Martin*, 25 F3d 293, 295 (CA 6, 1994) ("While the right to self-representation is related to the right to counsel, the right to self-representation is grounded more in considerations of free choice than in fair trial concerns.").

[22] 398 Mich 361; 247 NW2d 857 (1976). See also *People v Dennany*, 445 Mich 412; 519 NW2d 128 (1994).

knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business.

In addition, a trial court must satisfy the requirements of MCR 6.005(D), which provides in pertinent part as follows:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
>
> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

In *Adkins,* this Court clarified the scope of judicial inquiry required by *Anderson* and MCR 6.005(D) when confronted with an initial request for self-representation. *Adkins* rejected a "litany approach" in favor of a "substantial compliance" standard:

> We hold, therefore, that trial courts must substantially comply with the aforementioned substantive requirements set forth in both *Anderson* and MCR 6.005(D). Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an

express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures. The nonformalistic nature of a substantial compliance rule affords the protection of a strict compliance rule with far less of the problems associated with requiring courts to engage in a word-for-word litany approach. Further, we believe this standard protects the "vital constitutional rights involved while avoiding the unjustified manipulation which can otherwise throw a real but unnecessary burden on the criminal justice system."

Completion of these judicial procedures allows the court to consider a request to proceed in propria persona. *If a judge is uncertain regarding whether any of the waiver procedures are met, he should deny the defendant's request to proceed in propria persona, noting the reasons for the denial on the record. The defendant should then continue to be represented by retained or appointed counsel,* unless the judge determines substitute counsel is appropriate.[23]

Under *Adkins,* if the trial court fails to substantially comply with the requirements in *Anderson* and the court rule, then the defendant has not effectively waived his Sixth Amendment right to the assistance of counsel. In addition, the rule articulated in *Adkins* provides a practical, salutary tool to be used to avoid rewarding gamesmanship as well as to avoid the creation of appellate parachutes: if any irregularities exist in the waiver proceeding, the defendant should continue to be represented by counsel.

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[23] *Adkins, supra* at 726-727 (emphasis added; internal citation omitted).

C. RESOLUTION

In this case, a review of the record indicates two key facts: first, that defendant expressly rejected self-representation and, second, that defendant never voluntarily waived his Sixth Amendment right to the assistance of counsel at trial.[24] Indeed, defendant clearly sought appointment of *another* trial counsel, and defendant and the trial court engaged in a lengthy dialogue over defendant's desire to have substitute counsel appointed.

While defendant was given clear choices, defendant consistently denied that *his* choice was self-representation. Throughout his colloquy with the trial court, defendant steadfastly rejected the option of proceeding to trial without the assistance of counsel.[25] Therefore, it cannot be said, as the Court of Appeals and dissenting opinions maintain, that defendant *unequivocally* chose self-representation and

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[24] Because defendant clearly and unambiguously rejected self-representation, we need not address whether a defendant's desire to proceed pro se may *ever* be inferred by conduct.

[25] Defendant did not have the *right* to a third appointed counselor, because no defendant is entitled to the appointed counselor of his choice. See *Wheat v United States,* 486 US 153; 108 S Ct 1692; 100 L Ed 2d 140 (1988); *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973); *People v Portillo,* 241 Mich App 540; 616 NW2d 707 (2000). Rather, the decision to permit substitution of appointed counsel is within the discretion of the trial court. *People v Hooper,* 406 Mich 978; 280 NW2d 444 (1979). In this case, defendant does not argue that the trial court abused its discretion in failing to appoint substitute counsel; rather, defendant argues before this Court that the trial court reversibly erred because defendant did not unequivocally waive his right to counsel and did not elect to represent himself.

voluntarily waived his Sixth Amendment right to counsel.[26]

We believe that defendant's repudiation of self-representation was unmistakable in this case. However, to the degree that defendant's refusal to explicitly choose between continued representation by appointed counsel and self-representation created any ambiguity regarding defendant's desire to unequivocally waive his right to trial counsel, any ambiguity should have been resolved in favor of representation because, consistently with *Adkins* and United States Supreme Court precedent, courts *must* indulge every reasonable presumption against the waiver of the right to counsel.[27]

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[26] As the dissent notes, there are some federal circuit court cases holding that an unreasonable insistence on the appointment of a new attorney operates as a waiver of the right to counsel. This view is in contravention of the principle articulated in *Johnson*. Until the United States Supreme Court sees fit to distinguish or overrule *Johnson*, this Court is required to follow it. Moreover, it does not logically follow that a defendant affirmatively waives a fundamental constitutional right simply because he insists on a favorable ruling on something to which he is not entitled. Under the theory advocated by the dissent, if a defendant were to insist on empaneling only left-handed jurors, his insistence would constitute an affirmative waiver of his right to a jury trial *even if* he explicitly indicates that he *desires* a jury trial.

[27] Because defendant's waiver of his right to the assistance of counsel at trial was not voluntary, we need not address whether defendant's waiver was knowing and intelligent. It is worth noting, however, that an effective waiver of *trial* counsel requires a more exacting waiver than that required to waive counsel at pretrial stages of the proceedings. See *Iowa v Tovar, supra*, 124 S Ct 1387-1388; 158 L Ed 2d 220-221 (requiring that a defendant "must be warned *specifically* of the hazards ahead" and that those warnings surrounding waiver of counsel at trial be "*rigorous[ly] conveyed*") (emphasis added; citation omitted).

IV. Conclusion

Because defendant unequivocally rejected self-representation and did not voluntarily waive his right to the assistance of counsel at trial, the trial court erred in requiring defendant to proceed in propria persona. The clear cut rule articulated by this Court in *Adkins* requires that counsel should have been retained where defendant explicitly rejected self-representation.[28] Accordingly, the decision of the Court of Appeals is reversed and the case is remanded to the trial court for a new trial.[29]

Robert P. Young, Jr.
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor

MARKMAN, J. (*dissenting*).

I respectfully dissent from the majority opinion because I agree with the trial court and the Court of Appeals and believe that defendant, by his conduct alone, "unequivocally" waived his constitutional and statutory right to trial counsel. US Const, Am VI; Const 1963, art 1, § 13; MCL 763.1. Because I believe that defendant's waiver

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[28] In this instance, the trial court should have simply denied defendant's request to appoint another counsel and continued with the proceedings. Defendant's *acceptance* of the trial court's discretionary ruling was not required.

[29] The complete denial of counsel at a critical stage of a criminal proceeding is a structural error that renders the result unreliable, thus requiring automatic reversal. *Gideon v Wainwright, supra; People v Duncan*, 462 Mich 47, 51-52; 610 NW2d 551 (2000).

also satisfied the requirements set forth by this Court in *People v Anderson,* 398 Mich 361, 367-368; 247 NW2d 857 (1976), and MCR 6.005(D), I would affirm defendant's conviction.

Further, I respectfully urge the United States Supreme Court to consider granting certiorari in this case to clarify the operation of the presumption against the waiver of trial counsel in *Johnson v Zerbst,* 304 US 458; 58 S Ct 1019; 82 L Ed 1461 (1938). In this case, defendant unreasonably refused to cooperate with his second court-appointed counsel, but also declined to assert that he wished to proceed pro se. Some federal courts have interpreted such conduct as constituting an effective waiver of the right to trial counsel, but the lack of clarity regarding the scope of the *Johnson* presumption continues to create constitutional uncertainty. Where a defendant unreasonably declines appointed counsel's services, the *Johnson* presumption should not remain inviolate. The right to trial counsel, the right to self-representation, and the prohibition against forcing trial counsel on an unwilling defendant intersect. Thus, courts must protect a defendant's rights while also safeguarding the integrity of the judicial process from delay tactics and gamesmanship, both of which are on display in this case. If defendant here had been *required* to retain his counsel, as the majority would require, he would now almost certainly be arguing that his right to trial counsel had been violated and that such counsel had been forced upon him against his will.

I. Background

Defendant was charged with possession of cocaine and heroin. At the beginning of trial, defendant informed the

trial court that he wanted his trial counsel, Damian Nunzio, removed and new trial counsel appointed.[1] Among other allegations, defendant claimed that there had been miscommunications between him and Nunzio, that Nunzio had been convinced of defendant's guilt, that Nunzio had failed to give defendant certain helpful documents, and that Nunzio had failed to call certain witnesses.

The court found that defendant had failed to present "some valid reason why a different lawyer should be appointed, other than the fact that [defendant was] seeming to have personal difficulties with the leading members of the bar." The trial court denied defendant's motion to appoint new counsel, and informed defendant that his options were as follows:

> You may, if you have made arrangements on your own, bring in your own lawyer at your own expense and hire anybody you want, and I will allow that lawyer to substitute right now and we'll go from here.
>
> Option number two, we can go forward with Mr. Nunzio, the second lawyer that's been provided for you at government expense, and try this case on the merits. I would strongly suggest that, if Mr. Nunzio thinks you have a valid defense, that you consult with him and work with him on it because he's a man that knows how to present such a defense.
>
> Or number three, you may decide to serve as your own counsel and represent yourself. I caution

[1] The trial court permitted defendant's first appointed trial counsel, Paul Mitchell, to withdraw after defendant complained about the manner in which he represented defendant.

you strongly against the third course because obviously a trial involves issues of complicated legal procedure and, unless you are legally trained, and I don't know whether you are or not but I suspect you are not, there are many pitfalls there for the unwary.

And that leads us, I suppose, to option four, which is sort of a variation on option number three, in which you provide your own defense but Mr. Nunzio would be available to consult with you and provide you assistance as to technical legal points when you need counsel. That pretty much exhausts the field, as far as I can determine at this moment, for what we might do about proceeding here today.

Defendant insisted that he did not want Nunzio to represent him because, "Mr. Nunzio has stated that he doesn't believe that I'm innocent." Nunzio denied this allegation.

The trial court explained to defendant that:

[E]ven if we were to assume arguendo that [Nunzio] did say that, and I don't believe it for a minute, it would not be germane. A lawyer represents a client by presenting his defense under the law.

* * *

It is not necessary that Mr. Nunzio believe you are innocent in order to represent you and present the very best defense available to you under the law. So, essentially we're sparring at shadows here, and this discussion is not getting us anywhere.

Defendant continued to insist that he did not want Nunzio to represent him. The trial court responded:

> I think I've given you the options as I understand them, and I'm prepared to go with whichever one you feel is the appropriate one to follow at this particular time.

Defendant replied, "*Well, I've expressed mine. I don't want Mr. Nunzio to represent me.*" (Emphasis added.)

The court then explained that only three options remained for defendant:

> Your options are that you may bring in counsel of your own choosing, which you've had many months to do and I don't see anybody sitting here, so I don't assume that [is] going to happen; or you may represent yourself in which case I will allow Mr. Nunzio to be available to provide you with legal counsel on technical and procedural points when you wish to consult with him.

The trial court then warned defendant about the dangers of self-representation, stating:

> If you wish to do that, I will certainly proceed in that fashion. I would not personally advise that you do that, but that's your right.
>
> * * *
>
> I should advise you that there is an ancient adage in the law, for good reason, that a man who acts as his own counsel has a fool for a client. The corollary to the rule is that he also has a fool for a lawyer, but, as a practical matter, it all winds up in the same place.

> My guess is that you will not fare well in that approach, but you have the right to take that approach if you wish to do it.

Defendant replied, "Well, that's putting words in my mouth." The trial court responded, "Well then maybe you should put words in your mouth and tell me what you want." Defendant responded, "Well, I told you. I don't want Mr. Nunzio as my attorney."

The trial transcript contains four more pages of dialogue between defendant and the trial court in which, although defendant continues to request that a new attorney be appointed for him, the trial court continued to deny such request. The court eventually states:

> What I really want to know is how you want to proceed so we can get started here. And I'm willing to take a recess and let you speak to Mr. Nunzio, or if you want don't want to speak to Mr. Nunzio, I'm willing to take a recess and let you contemplate the matter. But the fact is that we need to know what it is that you wish to do and within the range of the options, which I think I've pretty clearly delineated for you. I'm prepared to accommodate you.
>
> Now, do you wish to consult with Mr. Nunzio or mull this over for a few minutes, or are you ready to make an alternative choice at this time?

Defendant answered, "Your Honor, I thought I made myself clear here." The trial court replied, "Well apparently not because I haven't heard you make any choice . . . I just need to know which of those you wish to do."

The transcript contains another six pages of dialogue between the trial court and defendant in which defendant

complained about Nunzio's performance. After the trial court found all of defendant's allegations to be completely unfounded, the following exchange between the trial court and defendant occurred:

> *Defendant:* I don't – I don't want any contact with Mr. Nunzio, and I expressed that to you. I don't want Mr. Nunzio to have anything to do with anything in my case. . . . *There's no way that I will let him try to defend me.*
>
> * * *
>
> All right. Well, I just want it noted that I have stated the conflict between me and attorney Nunzio, and the statements that Mr. Nunzio has made in regards to me and my case, and there's *no way that I would feel comfortable with him having anything to do with the defense on my behalf.* And I'm requesting that you remove him from my case.
>
> *Court:* All right. Well, then, I will inform the jury that you have chosen to represent yourself and that Mr. Nunzio is available as your legal advisor. Now, are you ready to proceed or do you wish to take a few moments to get yourself organized.
>
> *Defendant:* (No verbal response)
>
> *Court:* Mr. Russell that's a question to you.
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> *Defendant:* I've requested to you, Your Honor, *I said that I don't want Mr. Nunzio involved in nothing of my defense,* and I am requesting of this court to appoint counsel.
>
> *Court:* Well, we have appointed counsel, Mr. Russell, and he sits next to you at this particular moment. Now, you can either work with Mr. Nunzio or demonstrate some reasonable basis why

> he should be removed, which you have not done, or else we're going to start this case and you can represent yourself.
>
> * * *
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> Inasmuch as you apparently have not made arrangements for alternate counsel, I suggest that you strongly consider going forward with the very capable lawyer that you have been provided. Failing that, I will protect your right to represent yourself. But this is the day and time of proceeding and we've run out of time. We've run out of options. So I suggest that you confine yourself to what we've discussed. [Emphasis added.]

Although the trial court then gave defendant several additional opportunities to select an option,[2] defendant continued to refuse to do so, at which time the trial court empanelled the jury and asked defendant if he had any questions for the panel. Defendant stated:

> Yes. Ladies and gentlemen, this is something totally new for me. I'm being forced into this situation. . . .
>
> I requested the Court appoint new counsel for me, and they said, for some reason being that we're here and they don't see the difference – any differences between me and Mr. Nunizo. So they forced me to go on with this trial alone by myself.

After a four-day trial, defendant was convicted on both charges and sentenced to consecutive prison terms of two-and-a-half to forty years on each count. Although the

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[2] In order to accord defendant adequate opportunity to consult with Nunzio regarding the four options, the trial court took two recesses, the first for twenty minutes and the second for one-and-a-half hours.

Court of Appeals remanded this case for correction of the presentence investigation report and resentencing, it affirmed defendant's convictions, concluding that defendant, by his conduct alone, had demonstrated his choice to represent himself at trial.[3]

II. Analysis

The United States Supreme Court has held that the right to self-representation is guaranteed by the Sixth Amendment of the United States Constitution, *Faretta v California,* 422 US 806, 819-820; 95 S Ct 2525; 45 L Ed 2d 562 (1975), and that a defendant may waive his right to counsel, provided he do so "competently and intelligently." *Johnson, supra* at 468. [W]hether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and *conduct* of the accused." *Id.* (emphasis added).

In Michigan, the right to self-representation is secured by both the state constitution and statute.[4] However, this Court has stated that a trial court may only permit a

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[3] 254 Mich App 11, 22; 656 NW2d 817 (2002).

[4] Const 1963, art 1, § 13 provides:

> A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney.

MCL 763.1 provides:

> On the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself, and he shall have a right to produce witnesses and proofs in his favor, and meet the witnesses who are produced against him face to face.

defendant to represent himself if the following requirements have been satisfied: (1) the defendant's request to represent himself has been unequivocal; (2) the defendant has asserted his right of self-representation "knowingly, intelligently, and voluntarily"; (3) the trial court has been satisfied that the defendant, in representing himself, "will not disrupt, unduly inconvenience and burden the court and the administration of the court's business." *People v Anderson,* 398 Mich 361, 367-368; 247 NW2d 857 (1976). Moreover, the trial court must also satisfy MCR 6.005(D).[5] *People v Adkins (After Remand)*, 452 Mich 702, 722; 551 NW2d 108 (1996). Taken together, the requirements of Michigan law are in accord with the waiver requirements of the federal constitution. See *Iowa v Tovar,* 541 US ___, 124 S Ct 1379, 158 L Ed 2d 209 (2004) ("the [federal] constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of the guilty plea"); *Faretta, supra* at 835 (holding that, before a defendant may waive his Sixth Amendment right to counsel, a defendant "should be made aware of the dangers and disadvantages of self-representation").

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[5] MCR 6.005(D) provides, in relevant part:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
>
> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

Compliance with these requirements mandates that the trial court "engage, on the record, in a methodical assessment of the wisdom of self-representation by the defendant." *Adkins, supra* at 721. The defendant must exhibit "'an intentional relinquishment or abandonment'" of the right to trial counsel, and the trial court should "'indulge every reasonable presumption against waiver'" of such right. *Id.*, quoting *Johnson, supra* at 464. Further, "'[p]resuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer.'" *Adkins, supra* at 721 (citations omitted).

Defendant asserts that the trial court abused its discretion when it declined defendant's request to appoint him a third attorney, thereby forcing defendant to represent himself. That is, defendant contends that because he did not expressly waive his right to trial counsel, such waiver was, at the very least, equivocal and, therefore, invalid.[6]

I disagree. A waiver of a defendant's right to trial counsel must be "unequivocal," *Anderson, supra* at 367, meaning only that such waiver must be "[c]lear; plain; capable of being understood in only one way, or as clearly demonstrated." Black's Law Dictionary (6th ed). I do not accept the standard proposed by defendant and implied by the majority – that only a verbal waiver can sufficiently constitute an "unequivocal" waiver of the right to trial

[6] It was entirely proper for the trial court to require defendant to choose between proceeding to trial with his present attorney and representing himself. See *United States v Grosshans*, 821 F2d 1247, 1251 (CA 6, 1987); *Maynard v Meachum*, 545 F2d 273, 278 (CA 1, 1976).

counsel. Neither defendant nor the majority has cited a single state or federal court decision that has adopted such a standard, and I do not believe this standard to be implicit in the requirement of an "unequivocal" waiver.

Here, defendant was offered four options by the trial court in response to his request for a third appointed counsel. Having clearly rejected three of these options, I believe, as a matter of logic, that it can be fairly concluded that defendant "unequivocally" assented to the fourth option. That defendant made clear his displeasure at being limited to these four options does not alter my conclusion. The fact that defendant desired the fifth option of being appointed a third counsel does not transform the trial court's decision to reject such an appointment into an abuse of discretion. See *Mowat v Walsh,* 254 Mich 302, 304; 236 NW 791 (1931); *People v Akins,* 259 Mich App 545, 556-557; 675 NW2d 863 (2003). As the majority has correctly noted, "no defendant is entitled to the appointed counselor of his choice." *Ante* at 12-13 n 25. Because there was no abuse of discretion, there was no fifth option. Defendant was properly limited by the trial court to four options, and he clearly rejected three of these.

Concerning the first option, defendant, despite repeated invitations and opportunities to hire his own counsel, failed to do so and expressed no interest in doing so. Concerning the third and fourth options, defendant, as noted earlier, unambiguously, repeatedly, and vehemently refused to have Nunzio represent him. *Supra* at 4-5, 7. The majority would disregard defendant's clear wishes on this point and force defendant to retain Nunzio. *Ante* at 14. In *Faretta, supra* at 820-821, the United States Supreme Court asserted that the Sixth Amendment "right to

counsel," does not permit the trial court to appoint counsel that defendant has refused to accept:

> The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant – not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. . . . This allocation can only be justified, however, by the defendant's consent, at the outset, and to accept counsel as his representative. An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense. [Emphasis in original.]

Faretta continued by stating, "no State or Colony had ever forced counsel upon an accused; no spokesman had ever suggested that such a practice would be tolerable, much less advisable." *Id.* at 832. The Court then observed:

> There can be no blinking at the fact that the right of an accused to conduct his own defense

> seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. See *Powell v Alabama,* 287 US 45 [53 S Ct 55; 77 L Ed 158 (1932)]; *Johnson v Zerbst,* 304 US 458 [58 S Ct 1019; 82 L Ed 1461 (1938)]; *Gideon v Wainwright,* 372 US 335 [83 S Ct 792; 9 L Ed 2d 799 (1963)]; *Argersinger v Hamlin,* 407 US 25 [92 S Ct 2006; 32 L Ed 2d 530 (1972)]. For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial. And a strong argument can surely be made that the whole thrust of those decisions must inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant.
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> But it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want. The value of state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them.
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> * * *
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> To force a lawyer on a defendant can only lead him to believe that the law contrives against him. [*Id.* at 832-834.]

Moreover, in his concurrence in *Martinez v Court of Appeals of California,* 528 US 152, 165; 120 S Ct 684; 145 L Ed 2d 597 (2000), Justice Scalia noted:

> I have no doubt that the Framers of our Constitution, who were suspicious enough of governmental power – including judicial power – that they insisted upon a citizen's right to be judged by an independent jury of private citizens, would not have found acceptable the compulsory assignment of counsel by the *Government* to plead a criminal defendant's case.
>
> That asserting the right of self-representation may often, or even usually, work to the defendant's disadvantage is no more remarkable – and no more a basis for withdrawing the right – than is the fact that proceeding without counsel in a custodial interrogation, or confessing to the crime, usually works to the defendant's disadvantage. Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people. As Justice Frankfurter eloquently put it for the Court in *Adams v United States ex rel. McCann,* 317 US 269, 280 [63 S Ct 236, 87 L Ed 268] (1942), to require the acceptance of counsel "is to imprison a man in his privileges and call it the Constitution."

Thus, after defendant told the trial court that he no longer wanted Nunzio to represent him, the trial court did not have the authority to force defendant to be represented by Nunzio.[7] Accordingly, I question the basis on which the

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[7] In response to the majority's assertion that, "[u]nder the theory advocated by the dissent, if a defendant were to insist on empaneling only left-handed jurors, his insistence would constitute an affirmative waiver of his right to a jury trial *even* if he explicitly indicates that he *desires* a jury trial," *ante* at 13, I simply note that, while a defendant

(Continued on following page)

majority asserts that "the trial court should have simply denied defendant's request to appoint another counsel and continued with the proceedings." *Ante* at 14, n 27.[8] Under *Faretta,* this type of action by the trial court would seemingly have violated defendant's Sixth Amendment right to trial counsel and presumably provided a basis for a new trial.

Thus, in light of *Faretta,* the only remaining option, and this was made abundantly clear to defendant, was the second option. That defendant did not expressly assent to this option is not dispositive of his choice – for such an option is all that remained available to him.[9] The majority's decision to require a defendant under circumstances such as these to *expressly* assent to self-representation is

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does have a constitutional right not to be represented by counsel he does not want, *Faretta, supra* at 833, a defendant does *not* have a constitutional right to empanel "only left-handed jurors." Accordingly, I find the majority's example unhelpful in resolving the constitutional issue raised in this case.

[8] It appears to me that the majority's "practical, salutary tool" of thrusting unwanted counsel onto a defendant is at least arguably in contravention of *Faretta. Ante* at 11. The majority focuses on only a single sentence in that case, *ante* at 7, n 12, while ignoring the general rule repeatedly set forth in *Faretta* that it is a violation of a defendant's Sixth Amendment right to trial counsel to "compel a defendant to accept a lawyer he does not want." *Supra* at 833.

[9] To further support my assertion that defendant unequivocally waived his right to trial counsel, I note that defendant did not contradict Nunzio, who, after meeting with defendant during an hour-and-a-half recess, told the trial court, "I believe Mr. Russell still contends he wishes to represent himself." If, as the majority asserts, defendant "consistently denied that his choice was self-representation," *ante* at 12, I question why defendant, who was decidedly vocal in expressing any disagreements that he had during trial proceedings, did not challenge the truth of this statement by Nunzio. From this, I can only surmise that Nunzio correctly characterized defendant's wishes.

either to ensure that a "no decision" impasse develops in the event that a defendant refuses to give an express assent, or to unwarrantedly pressure the trial court into disregarding its own judgment – appointing new trial counsel where it is not viewed as necessary – and enduring the necessary trial delays as new counsel orients himself.

That is, the majority's decision requires the trial court to exercise its discretion in accord with defendant's own preferences and to compel the trial court to grant him a third appointed counsel. But the question of such an exercise of discretion is a distinct question from whether the trial court has complied with its obligations in permitting a defendant to proceed to trial by self-representation. Because I believe that there has been no abuse of discretion by the trial court in rejecting defendant's application for a third appointed counsel, defendant has no right to such counsel. He has a right only to the four options identified by the trial court.

The upshot of the majority's decision, in my judgment, is that it undermines the administration of justice by encouraging gamesmanship in the courtroom by criminal defendants, making more readily available an appellate parachute for appellants, and frustrating the orderly progress of trial proceedings. As this Court has previously observed:

> The Court recognizes and sympathizes with the "Catch 22" judges face in the waiver of counsel setting. On the one hand, defendants have a right to counsel. On the other hand, defendants have a right to self-representation. We realize the potential for savvy defendants to use these

> competing rights as a means of securing an appellate parachute. [*Adkins, supra* at 724.]

Although a defendant's rights to trial counsel and to self-representation are intertwined, defendant here would ensure that these rights increasingly take on a "zero sum" relationship in which either the former or the latter right is necessarily violated, and in which one or the other becomes a potential basis for appellate reversal. This becomes more likely when formalisms (such as the majority's unfounded requirement that a waiver only be effected by verbal statement) come to prevail over an inquiry into the totality of circumstances, including both the verbal statements and the conduct of the defendant.

Under the circumstances of this case, I would find that defendant, by his conduct alone, unequivocally waived his right to trial counsel. Given defendant's knowledge that the trial court was unprepared to appoint new counsel and defendant's clear rejection of three of the four options offered to him by the trial court, I believe that these circumstances, which do not include a verbal statement of assent to self-representation, sufficiently give rise to an "unequivocal" waiver of his right to trial counsel.

Because of the disadvantages that inure from self-representation, a defendant must also "knowingly [and] intelligently" waive his right to trial counsel. *Anderson, supra* at 368. To satisfy this requirement, the trial court must ensure that a defendant has been "made sufficiently aware of his right to have counsel" and "of the possible consequences of a decision to forgo the aid of counsel" so that his choice "'is made with eyes open.'" *Patterson v Illinois,* 487 US 285, 292-293; 108 S Ct 2389; 101 L Ed 2d 261 (1988) (citations omitted); see also *Anderson, supra* at

368, 370-371. "The trial judge is in the best position to determine whether the defendant has made the waiver knowingly. . . ." *Adkins, supra* at 723 (citation omitted). In this case, the trial court engaged in a lengthy and methodical colloquy, over thirty-five pages long, explicitly warning defendant of the dangers of self-representation. Among other warnings, the trial court counseled that, "unless you are legally trained, . . . there are many pitfalls there for the unwary," and "I'm suggesting that you don't know legal procedure." The trial court also advised defendant as follows:

> I should advise you that there is an ancient adage in the law, for good reason, that a man who acts as his own counsel has a fool for a client. The corollary to the rule is that he also has a fool for a lawyer, but, as a practical matter, it all winds up in the same place.
>
> My guess is that you will not fare well in that approach, but you have a right to take that approach if you wish to do it. And, while I would not advise it, I will certainly guard your rights and see to it that you have the opportunity to present your own defense, if that's your wish.

Further, the trial court repeatedly warned defendant that if Nunzio were removed, new trial counsel would not be appointed. Finally, the trial court gave defendant numerous opportunities, including two separate recesses, to consult with Nunzio concerning defendant's four options. Accordingly, I am convinced, as was the trial court, that under the circumstances of this case, there is no question that defendant was provided with sufficient information to make a decision with "eyes wide open." Thus, I would hold that the trial court did not err in finding that defendant

"knowingly and intelligently" waived his right to trial counsel when he repeatedly informed the trial court that he no longer wanted Nunzio to represent him.

A defendant's waiver of his right to trial counsel must also be voluntary. *Anderson, supra* at 371. "The trial judge is in the best position to determine whether the defendant has made the waiver . . . voluntary." *Adkins, supra* at 723 (citation omitted). Substitution of counsel is a matter committed to the sound discretion of the trial court. *People v Williams,* 386 Mich 565, 578; 194 NW2d 337 (1972). "While a defendant may not be forced to proceed to trial with incompetent or unprepared counsel, . . . a refusal without good cause to proceed with able counsel is a 'voluntary' waiver." *Maynard v Meachum,* 545 F2d 273, 278 (CA 1, 1976). See also *United States v Harris,* 2 F3d 1452, 1455 (CA 7, 1993) (finding a voluntary and informed waiver where the defendant refused to cooperate with his lawyers and was told that no substitute counsel would be appointed for him); *United States v Kneeland,* 148 F3d 6, 12 (CA 1, 1998) (a waiver of the right to trial counsel must be considered involuntary if defendant had a valid reason for requesting the appointment of new trial counsel).

In *United States v Moore,* 706 F2d 538 (CA 5, 1983), the trial court required the defendant to proceed pro se after he rejected several court-appointed attorneys. Like the instant defendant, the defendant in *Moore* made statements on the record that he was not waiving his right to trial counsel, but that he simply wanted different trial counsel. Defendant was convicted and appealed his conviction on this basis.

The Fifth Circuit Court of Appeals affirmed the defendant's conviction, stating:

> [Defendant] refers to a statement by the trial court which indicates that the court knew [defendant] was not waiving his right to counsel. This misperceives the record. Viewed in the context of the entire dialogue, the trial court was noting its awareness that [defendant] was not waiving his demand for dismissal of his current attorney and appointment of another. That demand is precisely the issue herein presented: may a defendant repeatedly demand that his appointed counsel be relieved and that new counsel be appointed and, if the request is denied, contend that his sixth amendment right to counsel . . . has been violated? We answer that inquiry in the negative.
>
> We conclude that a persistent, unreasonable demand for dismissal of counsel and appointment of new counsel, as herein discussed, is the functional equivalent of a knowing and voluntary waiver of counsel. In such an instance the trial court may proceed to trial with the defendant representing himself. [*Id.* at 540.]

Similarly, in *United States v Fazzini,* 871 F2d 635 (CA 7, 1989), the defendant sought to remove his fourth court-appointed attorney. In allowing defendant to dismiss his latest attorney, the trial court "expressly found that defendant, through his actions, had knowingly and voluntarily waived the right to counsel." *Id.* at 642. During trial, the defendant claimed that he was being "forced" to proceed pro se, and continually expressed a desire for new counsel to be appointed.

Defendant was ultimately convicted. The Fourth Circuit Court of Appeals affirmed his conviction, stating:

> In this case, the defendant claims that he did not knowingly and intentionally waive his right to appointed counsel since he continued to ask for counsel even after Kling was excused from the case. Yet it is not necessary that a defendant verbally waive his right to counsel; so long as the district court has given the defendant sufficient opportunity to retain the assistance of appointed counsel, defendant's actions which have the effect of depriving himself of appointed counsel will establish a knowing and intentional choice. [*Id.*]

The instant defendant was essentially given only two viable options – continue with court-appointed counsel or continue without court-appointed counsel. Defendant made it abundantly clear that he would not be cooperating with his current counsel, and therefore, I believe, that he effectively chose to proceed pro se. Like the defendant in *Fazzini,* the instant defendant denied that he was making this choice. Nevertheless, the vehement negation of one choice – to proceed with his current counsel – constituted the acceptance of the only remaining option available – to proceed pro se.

I agree with the lower courts and believe that defendant consistently failed to assert a valid reason to have new court-appointed counsel, and thus voluntarily waived his right to trial counsel. The trial court asserted that "Mr. Nunzio is a man of considerable professional ability," with an extensive history of trial work, and is an "extremely capable" and "well-respected" defense attorney. Further, Nunzio himself apprised the trial court:

> Your honor, I am prepared to try the case. I am not only familiar with all the issues surrounding this case, but I have dealt with these

> cases numerous times in the last number of years. And I have communicated all of those relevant issues that I have explored. The discovery is complete. I've had the opportunity to look at discovery. I talked to the prosecutor in this case regarding this case. I am more than capable at this point in time trying the case
>
> * * *
>
> But counsel is ready to proceed to trial at this point in time.

Later, after defendant asserted "that Mr. Nunzio is not representing me in a proper[] fashion," the trial court responded, "I don't see that. I see no indication that Mr. Nunzio has done anything wrong at all." I agree with the trial court and the Court of Appeals and find no evidence in the record to suggest that Nunzio's representation of defendant "fell below an objective standard of reasonableness. . . ." *People v Gonzalez,* 468 Mich 636, 644; 664 NW2d 159 (2003). Nor does defendant present any evidence to the contrary. Because I believe that this Court should follow federal precedent, holding that an unreasonable insistence on the appointment of a new attorney operates as a waiver of the right to counsel, and that defendant's protests to the contrary do not render that waiver ambiguous, I dissent.[10]

To constitute a valid waiver of the right to trial counsel, the trial court must also be satisfied that in representing

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[10] As the majority correctly notes, the Supreme Court stated in *Martinez* that "the right to self-representation is not absolute" in that the defendant must choose self-representation voluntarily and intelligently. *Ante* at 8. *Cf. Caplin & Drysdale v United States,* 491 US 617, 651; 109 S Ct 2646; 105 L Ed 2d 528 (1989); *Arizona v Roberson,* 486 US 675, 686; 108 S Ct 2093; 100 L Ed 2d 704 (1988) (holding that even the constitutional right to counsel is not absolute.)

himself, defendant "will not disrupt, unduly inconvenience and burden the court and the administration of the court's business." *Anderson, supra* at 368. Because the trial court, in fact, allowed defendant to represent himself, I would hold that the trial court was persuaded that defendant, in representing himself, would not disrupt or otherwise inconvenience or burden the court and, thus, fulfilled the third requirement of *Anderson.*

Further, although the requirements in *Anderson* have been satisfied, the trial court must "substantially comply" with MCR 6.005(D) for a valid waiver to occur. *Adkins, supra* at 726. "A particular court's method of inquiring into and satisfying these concepts is decidedly up to it, as long as the concepts in these requirements are covered." *Id.* at 725. I would hold that MCR 6.005(D) was satisfied here because defendant was fully advised of the nature of the charges against him and the possible punishments in the information,[11] and of the risks involved in self-representation.[12]

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[11] At the outset of the trial, the court stated:

> Mr. Russell is here for trial today on charges of possession with intent to deliver less than 50 grams of cocaine, possession with intent to deliver less than 50 grams of heroin, and he is also charged as a fourth felony habitual offender.

See *Adkins, supra* at 730-731 (holding that the trial court had satisfied the requirement of MCR 6.005(D) that defendant be advised of the maximum and minimum sentences because "the judge had already expressed the nature of the charge and possible punishments to the defendant at his arraignment").

[12] "A particular court's method of inquiring into and satisfying [MCR 6.005(D)] is decidedly up to it, as long as [the proper] concepts . . . [are] covered." *Adkins, supra* at 725. Because the trial court counseled defendant that, "unless you are legally trained, . . . there are many pitfalls there for the unwary," we believe that its warning satisfied the

(Continued on following page)

Finally, the court should "indulge every *reasonable* presumption [de-italicize presumption] against waiver" of a defendant's right to trial counsel. *Adkins, supra* at 721 (citation omitted) (emphasis added). "'The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver.'" *Adkins, supra* at 721 (citations omitted). As previously discussed, defendant here intelligently waived his right to trial counsel by repeatedly stating that he did not want Nunzio to represent him.[13]

"The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including [the] *conduct of the accused.*" *Johnson, supra* at 464 (emphasis added). I would conclude that defendant's conduct, under the circumstances of this case – his informed and unequivocal refusal to accept *any* of the other three options offered to him by the trial court – constituted an acceptance of the only remaining option, and that defendant thereby "intentional[ly] relinquish[ed] or abandon[ed]" his right to trial counsel. *Id.*

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requirement of MCR 6.005(D) that the trial court advise defendant of "the risks involved in self representation. . . ."

[13] Defendant made the following statements concerning his desire that Nunzio not represent him: (1) "I don't – I don't want any contact with Mr. Nunzio, and I expressed that to you. I don't want Mr. Nunzio to have anything to do with anything in my case"; (2) "There is no way that I will let him try to defend me . . . [T]here's no way that I would feel comfortable with him having anything to do with the defense on my behalf"; and (3) "I don't want Mr. Nunzio involving in nothing of my defense."

III. Conclusion

I believe that defendant, by his conduct alone, unequivocally waived his constitutional and statutory right to trial counsel. Further, I believe that defendant's waiver satisfied the requirements of *Anderson* and MCR 6.005(D). Accordingly, I would hold that defendant waived his right to trial counsel and thus affirm the judgment of the Court of Appeals.

Stephen J. Markman
Maura D. Corrigan

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v LORD SHAWN RUSSELL, Defendant-Appellant.	FOR PUBLICATION November 8, 2002 9:10 a.m. No. 230382 Kent Circuit Court LC No. 99-007860-FH Updated Copy February 14, 2003

Before: Fitzgerald, P.J., and Holbrook, Jr., and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of one count of possession with intent to deliver less than fifty grams of cocaine and one count of possession with intent to deliver less than fifty grams of heroin. MCL 333.7401(2)(a)(*iv*). Defendant was sentenced to consecutive prison terms of 2½ to 40 years on each count. We affirm defendant's convictions, but remand for resentencing and correction of the presentence investigation report.

Defendant first argues that the trial court did not comply with the requirements to establish that he knowingly, intelligently, and voluntarily waived counsel before allowing him to act as his own attorney at trial. MCR 6.005(D); *People v Anderson,* 398 Mich 361, 366-367; 247 NW2d 857 (1976). Defendant contends that he neither stated that he waived counsel nor unequivocally requested to proceed pro se, a necessary prerequisite to invoke his

right of self-representation. *Id.* at 367. Further, defendant's expression of dissatisfaction with counsel is not an unequivocal request to represent himself, *People v Pruitt,* 28 Mich App 270, 272; 184 NW2d 292 (1970), nor does the presence of standby counsel legitimize an invalid waiver of counsel, *People v Lane,* 453 Mich 132, 138; 551 NW2d 382 (1996). The prosecutor argues that defendant's conduct and refusal to accept representation by appointed counsel constituted a knowing and intelligent waiver of his constitutional right to counsel. We agree with the prosecutor.

In this case, defendant continually complained about his court-appointed counsel. Defendant's first appointed counsel, Paul Mitchell, was permitted to withdraw after defendant complained of his representation. Defendant's complaints concerning Mitchell mirrored those he would later raise about Damian Nunzio, who was appointed to replace Mitchell. On the first day of trial, defendant asked that Nunzio be removed and substitute counsel be appointed. Defendant's complaints concerning Nunzio included lack of communication and failure to furnish discovery, that Nunzio lacked belief in his innocence, that Nunzio failed to file a "14-day rule" motion, and that defendant had filed a grievance, which neither Nunzio nor the trial court could confirm. Nunzio indicated that he had repeatedly attempted to communicate with defendant, that he had explored all relevant issues, that he had completed discovery, and that he was prepared to try the case. Nunzio acknowledged that he and defendant had "a different point of view" concerning the trial. Defendant acknowledged that his problem communicating with Nunzio resulted from a personality conflict. The trial court found that defendant had developed personality difficulties with two "of the very best lawyers available" from the

local bar. The trial court also found that Nunzio was a good, experienced lawyer who had succeeded in getting some evidence suppressed and, accordingly, the trial court found that no valid reason existed to replace him with substitute counsel.

The trial court is in the best position to determine whether facts exist that establish "good cause" to replace appointed counsel. MCR 2.613(C); *People v LeBlanc,* 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Ahumada,* 222 Mich App 612, 614; 564 NW2d 188 (1997). In this case, good cause was not demonstrated by the allegations of defendant that counsel did not see things defendant's way, *People v Meyers (On Remand),* 124 Mich App 148, 165-166; 335 NW2d 189 (1983). Further, that counsel did not pursue futile motions or meaningless discovery did not demonstrate good cause because matters of general legal expertise and strategy fall within the sphere of the professional judgment of counsel. See, *People v Traylor,* 245 Mich App 460, 462; 628 NW2d 120 (2001) (filing frivolous motions), *People v Jones,* 168 Mich App 191, 195; 423 NW2d 614 (1988) (questioning witnesses), and *People v O'Brien,* 89 Mich App 704, 708; 282 NW2d 190 (1979) (questioning witnesses and juror voir dire). Moreover, it is apparent that the trial court was concerned that appointing substitute counsel, when the jury was waiting to hear a case that had already experienced substantial delay, would unreasonably disrupt the judicial process. *People v Mack,* 190 Mich App 7, 14; 475 NW2d 830 (1991); *Jones, supra* at 194. Thus, the record supports the trial court's conclusion that good cause had not been shown to warrant appointment of substitute counsel. Additionally, granting the request would have disrupted the judicial process without necessarily resolving defendant's complaints.

Accordingly, the trial court did not abuse its discretion in denying defendant's request to appoint substitute counsel. *Traylor, supra* at 462; *Mack, supra.*

With respect to waiver of counsel at trial, the United States Supreme Court has held that the Sixth Amendment right to counsel also implies the right of self-representation. *Faretta v California,* 422 U.S. 806, 821; 95 S Ct 2525; 45 L Ed 2d 562 (1975). In Michigan, the right of self-representation is explicitly recognized by our constitution and by statute. Const 1963, art 1, § 13; MCL 763.1; *People v Adkins (After Remand),* 452 Mich 702, 720; 551 NW2d 108 (1996). But a defendant cannot exercise both his right to self-representation and his right to counsel; he must choose one or the other. *Id.; People v Dennany,* 445 Mich 412, 442; 519 NW2d 128 (1994) (Griffin, J.). Thus, because self-representation involves forgoing the right to counsel, a defendant must knowingly and intelligently waive his right to counsel before being permitted to represent himself. *Faretta, supra* at 835. "The defendant must exhibit 'an intentional relinquishment or abandonment' of the right to counsel, and the court should 'indulge every reasonable presumption against waiver' of that right." *Adkins, supra* at 721, quoting *Johnson v Zerbst,* 304 U.S. 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938). A defendant may only enter into self-representation "with his eyes open," aware of the dangers of acting as his own counsel. *Faretta, supra; Adkins, supra* at 725.

In the present case, when defendant expressed dissatisfaction with appointed counsel, the trial court indicated its willingness to appoint substitute counsel, provided defendant had a valid reason other than a personality clash to do so. The trial court made it clear, however, that if defendant failed to establish good cause, his options

were (1) retain his own counsel, (2) continue with court-appointed counsel, (3) represent himself, or (4) represent himself with court-appointed counsel as a legal advisor. The trial court repeatedly advised defendant of the options that were available to him. The trial court also warned defendant of the dangers of self-representation, including, "unless you are legally trained . . . there are many pitfalls there for the unwary," and "I'm suggesting that you don't know legal procedure." The trial court also advised defendant as follows:

> I should advise you that there is an ancient adage in the law, for good reason, that a man who acts as his own counsel has a fool for a client. The corollary to the rule is that he also has a fool for a lawyer, but, as a practical matter, it all winds up in the same place.
>
> My guess is that you will not fare well in that approach, but you have a right to take that approach if you wish to do it. And, while I would not advise it, I will certainly guard your rights and see to it that you have the opportunity to present your own defense, if that's your wish.

After ruling that defendant had not shown good cause to replace his appointed counsel, the trial court twice strongly urged defendant to accept representation by Nunzio, who the court opined had done a good job preparing the case, and who the trial court described as one of the best lawyers of the local bar. Throughout the waiver colloquy, the trial court on several occasions suggested a recess to give defendant an opportunity to consult with court-appointed counsel. Further, the trial court took two recesses before allowing defendant to proceed pro se, the first for twenty minutes and the second for 1½ hours, to

give defendant the opportunity to consult with counsel and weigh his options. Although the trial court did not explicitly comply with that portion of MCR 6.005(D)(1) that requires "advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law," during the first trial court recess defendant was provided with a copy of the information, which would contain those facts, along with items such as the police reports, register of actions, and other discovery items.

The record demonstrates that defendant was thoroughly advised of the risks of self-representation and was repeatedly advised that if he chose to reject court-appointed counsel, his options were self-representation or to retain counsel. Defendant made his unequivocal choice, not by explicitly demanding to represent himself, but implicitly by repeatedly rejecting representation by court-appointed counsel in the face of numerous warnings and advice to the contrary.

Thus, by his own conduct defendant demonstrated his unequivocal choice to proceed in propria persona. Defendant confirmed this choice again after jury selection when he again asserted that he did not want Nunzio to participate in the trial. In *Mack, supra* at 13, the defendant also argued that his appointed counsel was ineffective and the trial court, as in the case at bar, offered the defendant the choice of either keeping appointed counsel or representing himself. Although the facts of *Mack* are slightly different, the totality of the circumstances in this case, "including the background, experience and conduct of the accused," *Anderson, supra* at 370; *People v Riley,* 156 Mich App 396, 399; 401 NW2d 875 (1986), established the same conclusion, that defendant knowingly, intelligently, and voluntarily

waived his right to counsel aware of the dangers of self-representation. *Adkins, supra* at 725; *Mack, supra* at 15-16.

The trial court did not abuse its discretion in denying defendant's request for substitute appointed counsel. The trial court also substantially complied with the *Anderson* rules and MCR 6.005(D) and did not err in finding that defendant knowingly, intelligently, and voluntarily waived his right to counsel. Finally, the trial court did not abuse its discretion in permitting defendant to proceed in propria persona. *Adkins, supra* at 721, n 16.

Defendant also argues that the trial court erred in failing to comply with MCR 6.005(E) at sentencing and that, as a consequence, he did not effectively waive his right to counsel. Further, defendant argues that even if the claim of error was forfeited, it nonetheless was plain error and affected his substantial rights. We agree with defendant that a remand for resentencing with the offer of appointed counsel is required.

The Sixth Amendment right to counsel extends to every critical stage of the proceeding. *People v Anderson (After Remand),* 446 Mich 392, 402; 521 NW2d 538 (1994); *People v Marsack,* 231 Mich App 364, 377; 586 NW2d 234 (1998). Sentencing is a critical stage at which a defendant has a constitutional right to counsel that includes the right to effective assistance of counsel. *People v Pubrat,* 451 Mich 589, 594; 548 NW2d 595 (1996). Thus, if a defendant "either was denied counsel or denied the effective assistance of counsel, he is entitled to relief." *Id.*

The record in this case clearly indicates that at the sentence proceedings the trial court did not comply with MCR 6.005(E), which provides:

> If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings, (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or (2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

Our Supreme Court has explained that this court rule is not onerous.

> MCR 6.005(E) requires only that the record show that the court advised the defendant of the right to an attorney and informed the defendant that an attorney would be appointed for him if the defendant were indigent, and that defendant either waived the right to counsel or requested a lawyer. In most circumstances, these requirements would be adequately met by the judge telling the defendant that in the upcoming proceeding he has the right to an attorney, at public expense if necessary, and asking the defendant whether he wishes to have an attorney or to continue to represent himself. [*Lane, supra* at 137.]

Our Supreme Court concluded in *Lane, supra* at 141, that although the failure to comply with MCR 6.005(E)

could have been outcome determinative because the defendant might otherwise have requested counsel, it nevertheless affirmed because prejudice had not been alleged by the defendant. In this case, defendant alleges prejudice because he wanted counsel and did not validly waive counsel. Moreover, defendant alleges prejudice because his sentence might have been less if he had been represented by counsel and because he did not have the assistance of counsel to implement correction of the presentence report by submitting an order for the trial court to enter. The prosecutor argues that the trial court's error in not complying with MCR 6.005(E) was harmless because the positions of defendant and the trial court had not changed from the time of the trial, that is, defendant would not accept Nunzio's representation and the trial court would not appoint substitute counsel. We disagree.

Although the record confirms that defendant's position had not changed in that he wanted to be represented by counsel, but was unwilling to accept Nunzio as court-appointed counsel, the premise relied on to find a valid waiver of counsel at trial may no longer have existed at the time of sentencing two months after the trial. Defendant's waiver of counsel at trial was premised on the trial court's proper denial of defendant's motion for substitute counsel, and thereafter, defendant knowingly, intelligently, and voluntarily chose to proceed pro se rather than accept court-appointed counsel. At the time of sentencing, however, the continued vitality of that premise, that defendant was not entitled to appointment of substitute counsel, was questionable. While the record from the trial supports the conclusion that Nunzio was ready, able, and willing to effectively represent defendant at trial, the record from the sentencing indicates that it might have been an abuse

of discretion for the trial court to have denied a request for substitute counsel had it been made.

At the sentencing, Nunzio was clearly "tired" of defendant's constant complaining. Nunzio acknowledged that he had not talked to defendant at the jail before the sentencing. Although Nunzio indicated that he was still patient and willing to assist defendant, he also revealed that defendant had filed "a formal complaint against counsel," which Nunzio had received after the trial and that Nunzio had asked to be removed as legal advisor before imposition of the sentence. The record also suggests that Nunzio viewed the situation as pointless. Further, at one point, the trial court was willing to accommodate defendant's concerns about Nunzio by asking Nunzio to leave.

Moreover, at the time of the sentencing, the trial court did not have a jury waiting in the wings to hear a case that had already been delayed. Rather, the speedy-trial clock had stopped ticking and defendant was incarcerated pending sentencing on two convictions that require consecutive sentences of up to life in prison. Delaying defendant's sentencing for a week or two to facilitate appointment of substitute counsel would not have been an undue burden on the criminal justice system.

The complete denial of counsel at a critical stage of a criminal proceeding is structural error rendering the result unreliable and requiring automatic reversal. *Gideon v Wainwright,* 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963); *People v Duncan,* 462 Mich 47, 51-52; 610 NW2d 551 (2000). Moreover, the failure to comply with MCR 6.005(E) denied defendant the substantial right of being offered appointed counsel and this trial error seriously

affected the fairness, integrity, or public reputation of judicial proceedings, mandating the remand of this matter for resentencing. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999).

At the sentencing proceeding, defendant claimed that the presentence report incorrectly reported he had been on probation in 1972 and 1973 (as a juvenile for truancy and "disobedience"), and he also disputed that he had threatened a cab driver with a gun as part of a 1991 conviction of carrying a concealed weapon. The trial court accepted defendant's version and agreed to enter an order to strike the objectionable material upon submission, but the report was not corrected. The prosecutor agrees that defendant is entitled to have the objectionable material stricken from the presentence report.

Both MCL § 771.14(6) and MCR 6.425(D)(3)(a) require that information in the presentence report that the trial court determines is inaccurate or irrelevant must be either corrected or stricken from the report. Therefore, a remand for the ministerial task of correcting the presentence report is required.

Defendant's convictions are affirmed, but the case is remanded for appointment of counsel, if defendant so desires, for resentencing, and for correction of the presentence report. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh

STATE OF MICHIGAN

THE 17TH CIRCUIT COURT FOR THE
COUNTY OF KENT

**THE PEOPLE OF THE
STATE OF MICHIGAN,**

vs

No. 99-07860-FH

LORD SHAWN RUSSELL,

Defendant. /

JURY TRIAL (DAY ONE OF FOUR)

BEFORE HONORABLE
DONALD A. JOHNSTON, CIRCUIT JUDGE

Grand Rapids, Michigan – **Monday, July 10, 2000**

APPEARANCES:

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[2] **TABLE OF CONTENTS**

WITNESSES: **PAGE**

None.

EXHIBITS: **IDENTIFIED** **RECEIVED**

None.

[3] Grand Rapids, Michigan

Monday, July 10, 2000 at 9:35 a.m.

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MR. CORTES: Good morning, Your Honor.

THE COURT: Good morning, gentlemen. We are convened today in the case of ***The People*** against ***Lord Shawn Russell***. This is, I believe, case 7860.

Mr. Russell is here for trial today on charges of possession with intent to deliver less than 50 grams of cocaine, possession with intent to deliver less than 50 grams of heroin, and he is also charged as a fourth felony habitual offender.

Of course the trial by jury would be limited to the possession with intent to deliver counts. The question of whether the defendant is appropriately charged as a habitual criminal offender would be addressed in the presentence period, if he is convicted.

Mr. Pablo Cortes appears representing the People for trial today. The defendant is in court with and represented by Mr. Damian Nunzio.

I assume we have a jury panel standing by and ready to go. Mr. Cortes, any matters you wish to take up before we get to that point?

MR. CORTES: No, Your Honor.

THE COURT: Mr. Nunzio?

[4] MR. NUNZIO: Your Honor, over the course of this, I am – I had replaced Paul Mitchell as the attorney of record some time ago and, during that course, apparently Mr. Russell has been unhappy with my representation and wishes, I still believe today even on day of trial, wishes that counsel remove himself.

I would just like to say for the record, I have explored all the issues – relevant issues to this case, attempted to be in contact, and contacted Mr. Russell regarding some of those issues. However, he, I believe is still unhappy with my representation, and I believe today he probably would like to address the Court with respect to counsel being removed today.

So, I certainly would defer to Mr. Russell to address some of those issues and let the Court decide which way it will. Thank you.

THE COURT: All right. Thank you, Mr. Nunzio.

Well, Mr. Russell, I think you and I have had this discussion before. Is there something you would like to say at this time and are there any issues you believe we should address before we commence with the empaneling of a jury?

MR. RUSSELL: Yes. Are you Judge Johnston?

THE COURT: I am.

MR. RUSSELL: This is the first time I been in front of you.

[5] THE COURT: I thought we spoke once before but I may be wrong.

MR. RUSSELL: No, no.

THE COURT: In any event, if we haven't, I stand corrected, and I'm certainly pleased to hear anything you wish to say.

MR. RUSSELL: All right. First of all, there's been a timely notice to my dissatisfaction to Mr. Nunzio's actions and representation of me. I've made it noted at my arraignment here that I was dissatisfied with his conduct and actions. I've requested certain things of Mr. Nunzio since his appointment. I even asked – sent letters addressed to this Court, you, to forward to Mr. Nunzio because of the lack of contact that he's allowed.

There was no line of communication available for me to contact him. Once I did make contact with him and try to establish a line of – for myself, I asked him to obtain certain documents which, to this date, hasn't been done.

I asked him to file certain motions that hasn't been done. I've been a year trying to get a motion filed and, to my knowledge, that if the motion isn't filed, I lose my right on appeal to have it filed. All right?

Now, to my understanding, a motion to squash, for some reason which I never even been enlightened of, was filed, which I considered to be meaningless to me because [6] the law says certain things. They don't even pay attorneys to file these motions and that most circuit court judges don't even grant them. So, it's like everything that he's done, which was that, it's been meaningless to my case.

I first explained to him, when he first contacted me, that I've been here for an extended period of time on a – on this case without the proper representation, and what the other attorney had allowed to happen, I didn't want for a lapse of time to go by without action in my case.

I told him – I explained to him. He said, "Well, I don't want to do something that may extend your stay here." I said – I tried to express to him that, if it wasn't a point of issues being part of my case that I was concerned with, it was the fact that not – no issues being filed, which has been the case with him.

I asked him to request for a bond reduction in my case. I should be granted a personal recognance (sic) bond by now. I asked him to have a technician – lab technician testimony submitted in the court. This is where the conflict of –

THE COURT: I assume we will have the lab technicians testimony.

MR. RUSSELL: I'm saying that my –

THE COURT: This is a trial, and I assume in a trial, all evidence will have to be presented, unless there [7] are stipulations or agreements to the contrary. So, I assume we will hear from the lab technicians.

MR. RUSSELL: Okay. Well, this was at my prelim down that I wanted it.

THE COURT: Oh, I see. All right. Well, the prelim is by way of being water under the bridge at this point. I know enough about the case to know that you've had Mr. Paul Mitchell as counsel, and then he was replaced by Mr. Nunzio – Damian Nunzio.

Both of these gentlemen have extensive histories of lengthy trials before this Court over a number of years, and are extremely capable and well-respected defense lawyers. Mr. Nunzio is a man of considerable professional ability and he obviously has not disclosed anything about your case which would breach any confidences, but he did tell me that he thought there was a good defense that could be pursued if you would work with him on it.

Now, you're not required to do so. The Court has provided you not one, but two lawyers at public expense. If there is some valid reason why a different lawyer should be appointed, other than the fact that you're seeming to have personality difficulties with the leading members of the bar, I would entertain it.

Failing that, our alternatives here basically these. You may, if you have made arrangements on your own, [8] bring in your own lawyer at your own expense and hire anybody you want, and I will allow that lawyer to substitute right now and we'll go from there.

Option number two, we can go forward with Mr. Nunzio, the second lawyer that's been provided for you at government expense, and try this case on the merits. I would strongly suggest that, if Mr. Nunzio thinks you have a valid defense, that you consult with him and work with him on it because he's a man that knows how to present such a defense.

Or number three, you may decide to serve as your own counsel and represent yourself. I caution you strongly against the third course because obviously a trial involves issues of complicated legal procedure and, unless you are legally trained, and I don't know whether you are or not

but I suspect you are not, there are many pitfalls there for the unwary.

And that leads us, I suppose, to option number four, which is sort of a variation on option number three, in which you would provide your own defense but Mr. Nunzio would be available to consult with you and provide you assistance as to technical legal points when you need counsel.

That pretty much exhausts the field, as far as I can determine at this moment, for what we might do about [9] proceeding here today.

MR. RUSSELL: All right. Well, Mr. Nunzio has stated that he doesn't believe that I'm innocent. So I don't see where I guess he could –

THE COURT: Mr. Nunzio is shaking his head, and I have to agree –

MR. RUSSELL: Well, I –

THE COURT: – That seems like a very odd thing for Mr. Nunzio or anybody else to say.

MR. RUSSELL: – all right. Okay. Well –

THE COURT: Although let me say this. First of all, I can't imagine that he said any such thing, but whether he believes you're innocent or not is not relevant. The fact is he is prepared to and capable of presenting your defense. His belief as to your guilt or innocence is not germane to the issues that are before the Court.

MR. RUSSELL: Well, anytime that someone tells you that they don't believe that you are innocent and takes an opinionated (sic) value from himself and places it

in regards of them defending you is weight enough that there's no way that he could possibly defend me.

THE COURT: Well, that, of course, is not correct, Mr. Russell. As I said, first of all, Mr. Nunzio is shaking his head. I strongly doubt that he said he believed you are guilty.

[10] MR. RUSSELL: Well –

THE COURT: That would seem to be completely out of character. But, even if we were to assume arguendo that he did say that, and I don't believe it for a minute, it would not be germane. A lawyer represents a client by presenting his defense under the law. The beliefs within the inner being, within the heart and soul and mind of the lawyer, as to the guilt or innocence of his client are not the issue.

It is not necessary that Mr. Nunzio believe you are innocent in order to represent you and present the very best defense available to you under the law.

So, essentially we're sparring at shadows here, and this discussion is not getting us anywhere.

MR. RUSSELL: I saying his actions – his actions towards me, towards my case, towards my defense has displayed this. So –

THE COURT: Well, I guess I haven't seen that.

MR. RUSSELL: Well, I have and I have addressed the court on several occasions with letters notifying them of this.

THE COURT: Well, as I said, I think I've given you the options as I understand them, and I'm prepared to

go with whichever one you feel is the appropriate one to follow at this particular time.

[11] MR. RUSSELL: Well, I've expressed mine. I don't want Mr. Nunzio to represent me. I don't feel that – I don't feel comfortable. I don't feel that assured that I can get proper representation from him. I don't –

THE COURT: Well, then your options are as indicated. Your options are that you may bring in counsel of your own choosing, which you've had many months to do and I don't see anybody sitting here, so I don't assume that isn't going to happen; or you may represent yourself, in which case I will allow Mr. Nunzio to be available to provide you with legal counsel on technical and procedural points when you wish to consult with him.

MR. RUSSELL: I don't think –

THE COURT: And, when the jury comes in, I will simply –

MR. RUSSELL: – that –

THE COURT: – when the jury comes in, I will simply inform the jury that you have exercised your constitutional right to serve as your own counsel, and that Mr. Nunzio has been provided as your legal advisor. And that will be the long and the short of it.

If you wish to do that, I will certainly proceed in that fashion. I would not personally advise that you do that, but that's your right. And I've heard defendants come in here and say, "Well, as long as I'm going to ride on the [12] train, I'd just as soon be in the locomotive." And, if that's what you want to do, then I'll put you in the locomotive.

I should advise you that there is an ancient adage in the law, for good reason, that a man who acts as his own counsel has a fool for a client. The corollary to the rule is that he also has a fool for a lawyer, but, as a practical matter, it all winds up in the same place.

My guess is that you will not fare well in that approach, but you have a right to take that approach if you wish to do it. And, while I would not advise it, I will certainly guard your rights and see to it that you have the opportunity to present your own defense, if that's your wish.

MR. RUSSELL: Well, that's putting words in my mouth. I –

THE COURT: Well, then maybe you should put words in your mouth and tell me what you want.

MR. RUSSELL: Well, I told you. I don't want Mr. Nunzio as my attorney.

THE COURT: Well, then your options, as I think I've already gone through them – I'll do this once more. You may either represent yourself or, if you have a lawyer that over the last several months you have arranged to come in here and take your defense, that lawyer I will substitute [13] in immediately. But I don't see anybody jumping up and waiving their arms around and saying, "I've been retained to represent Mr. Russell and I will take over right now."

So, your options are really kind of limited.

MR. RUSSELL: The State has the obligation to give me representation.

THE COURT: And the State has given you not only one lawyer, Mr. Russell, but two at considerable public expense.

MR. RUSSELL: Okay.

THE COURT: And not only that, we've given you two of the very best lawyers available in the local bar.

MR. RUSSELL: Okay.

THE COURT: Now, it is not the State's obligation to give you a lawyer that you find to be personality pleasing to yourself.

MR. RUSSELL: I did not remove Paul Mitchell from my case.

THE COURT: Well, Mr. Mitchell was removed from your case due to a breakdown in the relationship, as I understand it.

MR. RUSSELL: Well, you know, something that – something that the court decides to do with, I'm not to be held accountable. You all took Mr. Mitchell off the case.

THE COURT: Well, we took Mr. Mitchell off the [14] case presumably because he requested to be taken off the case, and I think he requested to be taken off the case because you requested that he request that he be taken off the case.

MR. RUSSELL: No. When – when –

THE COURT: But this is ancient history, Mr. Russell, and it gets us nowhere.

MR. RUSSELL: Well, I know, and that's what I'm talking about. You're saying that you've given me two

attorneys. I'm telling you that the one attorney you gave me, if you felt that way, you should have kept him there, not replace him.

THE COURT: We try to go as far as we can with defendants in providing them with a harmonious defense, although obviously we can't just run through the entire roster of lawyers until you find somebody you like.

MR. RUSSELL: Well, this is the reason why, at the earliest stage in this, I notified you.

THE COURT: Well, and I understand that and I indicated that we would, if you wished to represent yourself in connection –

MR. RUSSELL: No one contacted me.

THE COURT: – if you wish to present your own defense, you may do so and I will have Mr. Nunzio as your legal advisor. But we're ready to go here, Mr. Russell, and [15] I'm prepared –

MR. RUSSELL: Okay. Well, I'm saying – I'm saying three months ago when I notified you of this, no one – you didn't write me back. You didn't write me back with the concern that I had brought to you about this issue.

THE COURT: Well, if there's –

MR. RUSSELL: You wait – you wait until the day of trial to tell me this.

THE COURT: Well, Mr. Russell, this is the way the program operates, and I'm prepared to accommodate you –

MR. RUSSELL: Well, this is supposed to be a trial.

THE COURT: – in the choices that I've explained to you.

MR. RUSSELL: It's not supposed to be a program. This is supposed to be a trial, and I'm supposed to have some –

THE COURT: Well, it will be a trial as soon as we determine precisely how you wish to proceed. The jury has been waiting for some time now, and I would just as soon not keep them waiting any longer.

Now, do you wish to talk with Mr. Nunzio before you make a decision, or are you prepared to decide at this point how you want to proceed?

MR. RUSSELL: I've tried to talk to Mr. Nunzio and [16] I'm telling you it's a breakdown in communication. There's no way that him and I can reach any of grounds as far as me going to trial with him.

THE COURT: Well, Mr. Nunzio, is there anything you wish to say in this connection?

MR. NUNZIO: Your Honor, I just want to state, over the course of my representation of Mr. Russell, that counsel has made every attempt to communicate with him. I have met with him at the jail. I have written to him on more than one occasion, and I had attempted, as I am duty-bound, to work out any kinks in the relationship. I have attempted to break through those lines of bad communication, and I have done that over and over again.

And certainly I have put that in my letters to Mr. Russell that I would like to keep the communication open and work this out. But I think – I've tried that. However, he still maintains that there is a breakdown in our relationship.

THE COURT: I take it there's no breakdown in the relationship as far as you're concerned?

MR. NUNZIO: Your Honor, I am prepared to try the case. I am not only familiar with all the issues surrounding this case, but I have dealt with these cases numerous times in the last number of years. And I have communicated all of those relevant issues that I have [17] explored. The discovery is complete. I've had the opportunity to look at discovery. I talked to the prosecutor in this case regarding this case. I am more than capable at this point in time trying this case.

So, if Mr. Russell wishes to represent himself today at his option, I certainly will do what the Court tells me to do. But there seems to be a breakdown with respect to, I think, how counsel is proceeding to trial in this matter, and I don't know if that's technically a breakdown in the relationship. It's just a different point of view.

As Mr. Russell knows, you know, I am the court appointed lawyer in this matter, and I can understand his frustration being accused of this. But counsel is ready to proceed to trial at this point in time.

THE COURT: Well, Mr. Russell, I don't know what your problem with Mr Nunzio is particularly. I don't discern any from his perspective. He, apparently, is not having difficulty with you at all. Your difficulty is apparently with him, although apparently because of some

problem with a drug technician back when Mr. Mitchell represented you at the preliminary examination.

MR. RUSSELL: No, no. It goes –

THE COURT: So, I guess I –

MR. RUSSELL: – it goes – it goes further than [18] that. Also there's a grievance opinion on Mr. Nunzio in concerns of this case, which makes that – that alone makes it that he's not supposed to even represent me no further. His representation was supposed to be relinquished then.

THE COURT: I don't know about any grievance.

MR. RUSSELL: Yeah, well, there –

MR. NUNZIO: It's news to me, Your Honor. I haven't received any grievance. I certainly would have illuminated the Court with respect to that. I have not received a grievance.

THE COURT: None of us know about any grievance, Mr. Russell.

MR. RUSSELL: Well, you want to see – you want to see the – you want to see –

THE COURT: Well, actually, I don't. What I really want to know is how you want to proceed so we can get started here. And I'm willing to take a recess and let you speak to Mr. Nunzio or, if you don't want to speak to Mr. Nunzio, I'm willing to take a recess and let you contemplate the matter.

But the fact is that we need to know what it is that you wish to do and within the range of the options, which I

think I've pretty clearly delineated for you, I'm prepared to accommodate you.

Now, do you wish to consult with Mr. Nunzio or [19] mull this over for a few minutes, or are you ready to make an alternative choice at this time?

MR. RUSSELL: Your Honor, I thought I made myself clear here.

THE COURT: Well, apparently not because I haven't heard you make any choice. Did – once again, do you wish to bring in a lawyer of your own choosing, and I don't see him here if he's in the area? Do you wish to continue with Mr. Nunzio, who is here? Or do you wish to represent yourself, in which case I will provide Mr. Nunzio to you as a legal resource, since presumably you are not knowledgeable in technical matters and legal procedure?

I just need to know which of those you wish to do.

MR. RUSSELL: If Your Honor feels that I'm not knowledgeable in this area and I –

THE COURT: I'm suggesting that you don't know legal procedure.

MR. RUSSELL: – well, okay. And I'm saying, well, I'm in agreements (sic) with you in that. All right? And I'm saying that Mr. Nunzio is not representing me in a properly (sic) fashion.

THE COURT: I don't see that. I see no indication that Mr. Nunzio has done anything wrong at all.

MR. RUSSELL: Well, you've not investigated. You've not heard my complaints and pleadings.

[20] THE COURT: I have hundreds and hundreds of criminal cases. I don't sua sponte investigate every defense lawyer that is appointed to represent every defendant.

MR. RUSSELL: Okay, okay. And that's why they have a grievance commission.

THE COURT: That's fine.

MR. RUSSELL: That's why they have a chief judge that's written to about this here, and that's why I have expressed, as step by step, the manners in which I felt that he's not representing me properly.

THE COURT: I don't see any indication of his not representing you properly.

MR. RUSSELL: I'm telling you now. The pretrial motions themselves, you know, there should have been an evidentual (sic) hearing.

THE COURT: On what?

MR. RUSSELL: On the evidence. There's a conflicting –

THE COURT: We don't have evidentiary hearings on conflicting evidence. That's called a trial. The jury decides conflict.

MR. RUSSELL: Okay. No. I'm saying about the evidence itself for this case. A evidentual (sic) hearing is supposed to be held to see if there's even enough [21] evidence to proceed with trial.

THE COURT: That's called a preliminary examination, Mr. Russell.

MR. RUSSELL: Okay.

THE COURT: And that was held in this case many months ago.

MR. RUSSELL: Well, okay. Well, then a preliminary examination.

THE COURT: Well, that's been done. We've had that.

MR. RUSSELL: There were a 14-day rule. I asked for that motion to be filed. All right?

THE COURT: Well, that was Mr. Mitchell apparently, because –

MR. RUSSELL: It still hasn't been filed. I feel that alone is misrepresentation enough for me.

THE COURT: Mr. Russell, the –

MR. RUSSELL: He hasn't – he hasn't contacted my witnesses. He hasn't contacted or obtained the documents which I requested. He –

THE COURT: Well, what documents do you want? I can order documents produced if they're not here yet. What is it you're missing?

MR. RUSSELL: Oh, I had a list of them here of what –

[22] THE COURT: Well, if you don't know what they are, then they can't be –

MR. RUSSELL: Well, I'm going to tell you. One was the property slip. One was – I needed to know the

charge. I have not – I haven't even been given a complaint, a warrant.

THE COURT: Well, I happen to have that right here, and –

MR. RUSSELL: Well, I'm saying I don't have none of it. I haven't had a chance to look at nothing.

THE COURT: All right. So you want a property receipt?

MR. RUSSELL: I want – I want – I want everything that's in regards to prosecuting me. I want to know what they're prosecute – I haven't seen the discovery. They said they had a discovery.

THE COURT: Mr. Nunzio has –

MR. RUSSELL: Mr. Nunzio, if he has it – he has it –

THE COURT: He has all the discovery.

MR. RUSSELL: – he hasn't let me see.

THE COURT: Well, maybe what we should do then is for you to take 10 or 15 minutes. You and Mr. Nunzio can go through all these papers. He has all those things, Mr. Russell.

[23] MR. RUSSELL: Well, in 10 –

THE COURT: And these are matters of no substance?

MR. RUSSELL: in 10 or 15 minutes, I can't – I can't – I can't take something in 10 or 15 minutes and be prepared for trial.

THE COURT: Well, Mr. Russell, all you're talking about is an Information, which recites –

MR. RUSSELL: No, that's not all I'm –

THE COURT: – in very sterile language of the charge.

MR. RUSSELL: – that's not all I'm talking about. I'm talking – I'm talking –

THE COURT: The property receipt.

MR. RUSSELL: – I'm saying the whole proceeding.

THE COURT: Well, what else is there? You've named a property receipt and an Information. And those documents –

MR. RUSSELL: No, I'm saying –

THE COURT: – you can read –

MR. RUSSELL: – I'm saying that those – those are just some of the things.

THE COURT: Well, what else do you need? You tell me and we'll work on a list here.

MR. RUSSELL: Okay. Witnesses.

THE COURT: Okay. Those are on the Information.

[24] MR. RUSSELL: Okay. No, I'm talking about my witnesses.

MR. NUNZIO: Your Honor, I must stand up at this point in time and indicate to the Court that this is now news to me. If he has witnesses to bring –

MR. RUSSELL: Okay. Well, it was in the letter that the Court sent to you.

MR. NUNZIO: It's my turn, now. Okay?

MR. RUSSELL: Go ahead.

MR. NUNZIO: I'm trying to respond. Your Honor, at this point in time, if Mr. Russell has relevant triable witnesses, I'd certainly be more than happy to meet with him and discuss who those witnesses may be.

THE COURT: I think that would be a good idea, and I will issue subpoenas and compel their attendance. And if we have to have the police help find them, we'll do that. I mean, we have all sorts of resources available here, Mr. Russell, and we will work with you to bring any relevant witnesses into court that you need.

MR. NUNZIO: Your Honor, I just want to state for the record that, in my correspondence, I have outlined what the prosecution intends on showing in this trial against him, what evidence they intend to use against him. As the Court recalls, counsel did make a motion in limine to exclude certain evidence that the prosecution intends on [25] using against Mr. Russell, as well as a motion to quash the Information, challenging the bindover in this matter.

The 14-day rule, I have handled. I have indicated, and I guess that would be a matter for the Court of Appeals if there is conviction in this case, Your Honor, but counsel has looked into that and it was up to counsel's decision, in

the best interest of the client acting as in the best interest of the client, that I did not pursue that motion.

But that's – that's a separate concern on a separate day, and I don't believe it's an issue for today. And I've explained that in my correspondence to Mr. Russell.

So, I've explored everything of these with him. This is nothing new to Mr. Russell. I have outlined the relevant matters in – in correspondence to him.

Now, that is all I have to say.

THE COURT: Well, Mr. Russell, the only thing I can understand from what you've said is that there are some witnesses you would like to have summoned. If you will provide those – that information to Mr. Nunzio, he can, under authority of the Court, issue necessary subpoenas and we'll have those witnesses here.

MR. RUSSELL: He was given –

THE COURT: Now, do you want to speak to him for a few minutes about this before we proceed, or are you ready [26] to go now?

MR. RUSSELL: I don't – I don't want any contact with Mr. Nunzio, and I expressed that to you. I don't want Mr. Nunzio to have anything to do with anything in my case. Mr. Nunzio has expressed, as I told you, he's told me that he will convict me. There's no way that I will let him try to defend me.

MR. NUNZIO: Let me just deny that for the record. Under no certain terms have I ever expressed that to Mr. Russell.

THE COURT: Mr. Russell, this discussion has become absurd. Are you ready to –

MR. RUSSELL: It's not absurd. It's the truth.

THE COURT: – are you ready to proceed at this time to bring in the jury, since you don't apparently intend to give Mr. Nunzio the names of witnesses you want to have subpoenaed. I don't know how we can possibly get them in here.

Now, if you want to provide the information to the Court, I will issue the necessary subpoenas, although it would be easier for you to do it through Mr. Nunzio. But, absent that, nothing that you have said here today has any bearing on the greater issues that we have to deal with. And it seems to me it's time for us to get this business under way.

[27] MR. RUSSELL: All right. Well, I just want it noted that I have stated the conflict between me and attorney Nunzio, and the statements that Mr. Nunzio has made in regards to me and my case, and there's no way that I would feel comfortable with him having anything to do with the defense on my behalf.

And I'm requesting that you remove him from my case.

THE COURT: All right. Well then, I will inform the jury that you have chosen to represent yourself and that Mr. Nunzio is available as your legal advisor.

Now, are you ready to proceed or do you wish to take a few moments to get yourself organized?

MR. RUSSELL: (No verbal response)

THE COURT: Mr. Russell, that's a question to you.

MR. RUSSELL: I've requested to you, Your Honor. I said that I don't want Mr. Nunzio involved in nothing of my defense, and I am requesting of this Court to appoint counsel.

THE COURT: Well, we have appointed counsel, Mr. Russell, and he sits next to you at this particular moment. Now, you can either work with Mr. Nunzio or demonstrate some reasonable basis why he should be removed, which you have not done, or else we're going to start this case and you can represent yourself.

[28] This is not a good time to be fooling around over trivia and it's not a good time to engage in personality discussions.

We'll take a 10 minute recess. I'm going to check the status of the jury panel. I would suggest that you have a conference with Mr. Nunzio. If you feel that you can't talk to him, that's on your head. He has no difficulty speaking to you, and the personality problem would seem to reside at your corner.

Inasmuch as you apparently have not made arrangements for alternate counsel, I suggest that you strongly consider going forward with the very capable lawyer you have been provided. Failing that, I will protect your right to represent yourself.

But this is the day and time of proceeding and we've run out of time. We've run out of options. So I suggest that you confine yourself to what we've discussed.

We'll take about 10 minutes and, when we reconvene, we'll find the status of the jury panel.

MR. NUNZIO: Your Honor, if we can meet in the jury room –

THE COURT: I think that would be best.

MR. NUNZIO: Thank you, Your Honor.

THE COURT: We'll provide you a private and convenient place.

[29] MR. NUNZIO: Thank you.

(At 10:03 a.m., Court in recess)

(At 10:23 a.m., Court reconvenes)

THE COURT: Welcome back, ladies and gentlemen. We have reconvened in the matter of ***People*** versus ***Lord Shawn Russell***, file number 99-7860-FH. Mr. Russell and Mr. Nunzio were provided a jury room in which they could confer the last twenty/twenty-five minutes.

Mr. Russell, as I understand it, requested certain documents which Mr. Nunzio came down and asked for, including a property inventory, presumably of items taken from his automobile or some such place. I directed the prosecutor to provide that.

Mr. Russell also asked for a register of actions sheet, which is essentially a summary of all of the proceedings in the case, and that was brought up on screen on the computer and was printed out; and I have a copy of it here also. And it lists all the proceedings in about three pages beginning with the return of the 63rd District Court dated

August 13th, 1999, and extending to and through June 16th, 2000, Notice of Jury Trial and Proof of Service. All the other intervening events are likewise noted.

I believe Mr. Russell has all of the documents he has requested.

Mr. Nunzio?

[30] MR. NUNZIO: Your Honor, I don't wish to interrupt, however I just wanted to note for the record, so that there wasn't any miscommunication on my part or Mr. Russell's part, but I'm handing him now the Felony Register of Actions, the property receipt – there are three pages of property receipts with a number of items of which, I believe, contain pagers, the drugs that the prosecution intends on showing to be used against Mr. Russell, and some other assorted items. For the record, I'm going to hand them – those three pages.

It is my further understanding that Mr. Russell does, in fact, have the police report, the – all prior preliminary exam transcripts.

And just to further note that I believe Mr. Russell still contends he wishes to represent himself.

THE COURT: All right. Very well. Well, Mr. Russell, I think you've been provided with every possible document anybody can think of, and you have had a chance again to confer with Mr. Nunzio. Is Mr. Nunzio? You wish to represent yourself for the purposes of this trial?

MR. RUSSELL: Your Honor, first of all, I only spoke with Mr. Nunzio for about five minutes.

THE COURT: Well, if you wish to speak with him longer, I'm willing to allow further time.

MR. RUSSELL: No. Okay. Now, this, what I [31] received, is what they – this is not a complete – and I asked for a inventory slip of my car which was impounded at this particular date.

THE COURT: I didn't look at the document, Mr. Russell –

MR. RUSSELL: Okay.

THE COURT: – but I have to assume that's what it is. That's what I told the prosecutor to give you, an inventory of all the documents – all the materials they took from your car and, if it's three pages long, it must be quite thorough.

MR. RUSSELL: Okay.

THE COURT: So, I assume that's it.

MR. RUSSELL: No, it's not. This – this only revolves around the things which they wanted to admit as evidence. The things that I wanted – the complete list of the inventory of my car that night when it was impounded and they did an inventory search.

THE COURT: So you think there's some other things besides this?

MR. RUSSELL: I beg your pardon?

THE COURT: You think there's something other than the three pages that you've been given?

MR. RUSSELL: Yes. This – this – this is in regards to something else. All right? Then, there's been a

[32] – a misunderstanding or something overlooking. What I'm saying is that I want all of the paperwork in regards to my case so I can have a chance –

THE COURT: Well, apparently you have it all.

MR. RUSSELL: Well, no. I don't.

THE COURT: If there's something else you want and it's within my power to produce, I'll see that you get it. Now, we do have another document here called Vehicle Inventory/Release Form. It's very brief, but, if you'd like to look at that, I don't think that will be of much assistance to you, but you're certainly welcome to see it. And if you'd like a copy of it made, we'll see that you have a copy. It seems to just describe the condition of the vehicle. It says that all four tires are on it, for instance, and things like that.

So, I don't think you'll find that very helpful, but you may certainly have it. Mr. Nunzio says you have the Information and the preliminary exam transcripts, the police reports, and Register of Action. I'm at a loss as to what else you might want –

MR. RUSSELL: Okay. I –

THE COURT: – but if there's something you can identify, I'll –

MR. RUSSELL: I asked him for both trans- – bindover transfer (sic) or –

[33] THE COURT: You have those apparently.

MR. RUSSELL: Yeah.

THE COURT: So, I guess you're set.

MR. RUSSELL: No, I don't have them.

THE COURT: You don't –

MR. NUNZIO: Your Honor, he wants the actual document that states that the district court has bound the matter over to the circuit court. He has copies of all the preliminary exam transcripts – there were two – at length. He's got –

MR. RUSSELL: No.

MR. NUNZIO: – copies of the police –

MR. RUSSELL: There was three.

THE COURT: Well, whatever there are, apparently you have transcripts of them.

MR. RUSSELL: No, I don't.

MR. NUNZIO: Your Honor, I have provided copies of the two at least that I participated in – at least of the one I participated in. Mr. Mitchell participated in one. He has copies of those two, at least the testimony taken with respect to the district court matters. There was testimony taken twice, and he's got copies of those transcripts.

He's got copies of the police reports, the drug reports, copies for motions that I filed in this case. I [34] have informed him verbally and by written communication what discovery items that the prosecution intends on using against him, as well as those items that will not be used against him.

THE COURT: It should be noted that Mr. Nunzio succeeded in having some of the evidence against

you suppressed, Mr. Russell. This lawyer, who you think is inept, has succeeded in large measure in getting evidence excluded.

MR. RUSSELL: That's – well, the things that was discussed in there, I don't consider that as evidence. That was property of mine. So, I don't – I don't – I think that that was a waste of time because –

THE COURT: Well, if you'd like to have it come in, the prosecutor would like to admit it, I'm sure.

MR. RUSSELL: Okay. Well, he's – it seems like he's still having it admitted because all he did was separate part of it.

THE COURT: Well, I suppressed, at Mr. Nunzio's request, some of the evidence in this case. And, if you're going to try this case alone, you should be aware of what evidence is suppressed and what evidence isn't –

MR. RUSSELL: Okay. And –

THE COURT: – because it may make a difference.

MR. RUSSELL: All right. And that's something [35] else. I asked for the discovery. I want to know everything that the prosecutor has, and I haven't received that.

THE COURT: Well, apparently you have. I'm not sure what else you need, but I mean, if you want to discuss this further, I thought maybe you and Mr. Nunzio had gone through all of this long since, but apparently all of the documents are before you at the present time.

MR. RUSSELL: I keep telling Your Honor that me and Mr. Nunzio can't have a decent conversation. We cannot communicate between one another.

THE COURT: I guess I'm still at a loss as to why that is. You both seem like gentlemen to me. Mr. Nunzio I've known professionally for years. I don't know you, sir, but you seem to be quite articulate and capable of expressing yourself, and I certainly am prepared, since apparently in the 25 minutes you were together you were only able to speak with him for five minutes – then you can go through this document by document.

If there's something else –

MR. RUSSELL: That's – that's – that's why I've expressed to the Court that there's a conflict here.

THE COURT: But I don't see a conflict, Mr. Russell.

MR. RUSSELL: Okay, but you don't see it because it's something different when we come in here, you know. [36] That happens. That happens with people. People have personality conflicts.

THE COURT: Well, unfortunately I'm not in the business of trying to match personalities here.

MR. RUSSELL: Okay. Okay. Okay. And this is why it's my duty, you know, as well as his to make it knownable (sic) to the Court that –

THE COURT: Well, I agree, and so far all you've done is sit here and say, "I need these documents." We give them to you, and you say, "I don't have the documents."

MR. RUSSELL: No, no. Your Honor, we can't –

THE COURT: You want to talk with Mr. Nunzio. I have you talk with Mr. Nunzio. I have you talk with Mr. Nunzio and you say you haven't talked to Mr. Nunzio.

MR. RUSSELL: I just needed – I told you that it was impossible for us to have any communication. You insisted –

THE COURT: Well, except, Mr. Russell, you have to understand, if you want documents Mr. Nunzio has, I don't know how else we can do it unless you want to pass them through a deputy sheriff sitting between the two of you.

MR. RUSSELL: No, no. I – that's – that's – that's – that's not the point. We're speaking about just – you said communication – it appears that the communication is great between you two.

[37] THE COURT: I didn't say it was great. I just don't see any problem.

MR. RUSSELL: Okay. You don't see any problem because you're on the outside.

THE COURT: Well, it could be but it appears to me that the problem, whatever it is, is of your creation, Mr. Russell, and inasmuch as you're defense is at issue, I would strongly suggest that you try to get over it.

MR. RUSSELL: Well, that's a biased opinion because you just want to assume this to be me. It's not me. I'm trying – I'm trying – I've been trying to have a trial to have this matter resolved.

THE COURT: Well, and we should. It's a year old. It's time to try it.

MR. RUSSELL: I've been trying to have a fair trial, a speedy trial.

THE COURT: I'm here to see that you get a fair trial.

MR. RUSSELL: All right. Well, I can't have a fair trial with counsel that's not representing me properly.

THE COURT: Well, he is representing you properly. I can assure you. I've already told you he's succeeded in suppressing some of the evidence against you. Mr. Nunzio has worked with hundreds of defendants over the years.

MR. RUSSELL: That's – that's – that's – that's [38] irrelevant, Your Honor.

THE COURT: No, it isn't irrelevant.

MR. RUSSELL: Yes, it is when –

THE COURT: It's relevant because he knows his business and he's a good lawyer and he's doing his job. My suggestion to you is that you cooperate with the man so he do his job. And if you can't cooperate with the man, then you can try the case yourself, and that's fine. You have a constitutional right to do it. I don't think it's a good idea, but I'm here to guarantee your constitutional rights. And if you want to try your case yourself, by goodness, that's what we're going to do.

MR. RUSSELL: Well, that's what you keep insisting that I do, and I'm telling you that I need a competent counsel –

THE COURT: You've got competent counsel. He sits two feet to your right.

MR. NUNZIO: Your Honor, if I –

MR. RUSSELL: Well, his – his – his heart and soul isn't in it, and he's – he's – he has the conviction in his mind to see me convicted.

MR. NUNZIO: That is incorrect.

MR. RUSSELL: He's told me that.

MR. NUNZIO: And, Your Honor, if I may just state for the record, so that Mr. Russell has a copy of the [39] additional discovery requested, that would be the Vehicle Inventory Release form.

And I just want to illuminate for the record that, pursuant to 6201, a second request that counsel filed, because Mr. Mitchell had filed a previous request, items one through eleven have been satisfied by the prosecution. At least Mr. Cortes has informed me that all the items pursuant to 6201 have been satisfied, including counsel availing himself to look at the items that the prosecution intends on using against him.

Your Honor, again I would just state for the record that I have informed Mr. Russell by written correspondence what the items the prosecution intends on showing, and the subsequent order of this Court, pursuant to that motion, what they will and what they will not be showing.

So, we have gone through and over the items of discovery. We've gone over pretty much every part of this case. And the additional items of discovery, I guess would be items 12 and 13, pursuant to his request, have been

satisfied. At least to counsel's believe, 6201 has been complied with.

THE COURT: Well, Mr. Russell, I guess you've gotten everything that anybody has to give you. Some of these documents are of more assistance to you than others, [40] but you've gotten the whole boatload here. And I think we're ready to go.

I'm prepared at this time to ask the jury clerk to send a panel down here. It will take just probably ten minutes or so to achieve that result. If you want to, once again, compare notes with Mr. Nunzio you may do so because we're going to have some time for that.

When we reconvene, if you wish me to do it, I will inform the jury that you are representing yourself and that we have a lawyer available to provide you with legal and procedural assistance. If you wish to have Mr. Nunzio represent you in the normal fashion, then we'll go ahead in the normal fashion.

I should point out that the first stage here is to empanel a jury, and that entails questioning prospective juror members to touch upon their qualifications to serve as jurors in your case. If you've never done this before, it's a technical process and I would suggest you might want to consider either allowing Mr. Nunzio to do it for you, or at least to rely heavily upon his assistance in that regard.

Gentlemen, we'll take a break while we bring a jury panel down, and I'll make the jury room available at the end of the hall for Mr. Russell and Mr. Nunzio if they wish to spend time on this.

MR. NUNZIO: Thank you, Your Honor.

[41] MR. CORTES: Thank you.

(At 10:35 a.m., Court in recess)

(At 12:03 p.m., Court reconvenes with prospective jury panel)

THE COURT: Good morning, ladies and gentlemen of the jury panel, and welcome to the Kent County Circuit Court. I know you've been here all day but you haven't been down here and we've been busy with various matters and are now ready to kick off a case.

For those of you that didn't see my name on the door on the way in, I'm Judge Donald Johnston and, on behalf of all of the judges of the court, we welcome you to the jury panel for this term.

I know that jury duty may be a new experience for many of you. Jury duty is among the most serious duties members of a free society can be called upon to perform. Our system of self-governance cannot exist without it.

The jury is an important part of this court, and the right to a trial by jury is part of our ancient tradition and established legal heritage. Our legal system provides that a person accused of a crime, and also the prosecution in a criminal case, have the right to have their case determined not by a single individual but by a panel of 12 citizens chosen to be fair and impartial.

Jurors in this process must be as free as is

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